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Catch Me If You Can: Post – Daimler Transnational Litigation

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I. INTRODUCTION

> 'The result is to shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice.' (Reinhardt, J., dissenting, In: *Bauman v. Daimler Crysler Corp*, 579 F.3d 1088, 1098 (9th Cir. 2009).

In recent years, a number of multinational companies have been reported for alleged human rights violations,[1] yet only a limited amount of them have been investigated. Governments, the international community and stockholders often close their eyes to reality.[2] Only recently has the international community even begun to openly talk about the human rights' violations of transnational corporations.[3] In June 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on

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[1.] In 2013, there have been cases connected to corporations such as Walmart or The Gap for exploiting workers for cheap labour. For NGO archives on corporate human rights violations see generally, Human Rights Watch, *Corporation and Human Rights*, available online at <http://www.hrw.org/topic/business/corporations>, as well as the hub Business and Human Rights Centre, available online at <http://business-humanrights.org> accessed 25 May 2014.

[2.] For example; the World Bank's private sector lending arm, the International Finance Corporation (IFC) has invested in a palm oil and food company implicated in serious rights abuses in Honduras. After concluding the investigation, the IFC rejected some of the findings and did not actively participate in solving the raised concerns, available online at <http://www.oxfam.org/ en/pressroom/pressrelease/2014-01-10/world-bank-funding-company-implicated-human-rights-abuses-honduras> accessed 26 May 2014.

[3.] In 2005, John Ruggie was named the UN Secretary General's Special Representative on business and human rights.

Business and Human Rights.[4]

However, for many, it was not enough.[5] During the 24th Session of UN Human Rights Council in September 2013, the representative of Ecuador proposed a draft declaration entitled 'Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights,' initiating the process for a binding UN instrument on business and human rights, in order to stipulate the obligations of transnational corporations in the field of human rights and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is apparently unable to provide them.[6] During the 26th Session of UN Human Rights Council, two resolutions were tabled for adoption; one prepared by Ecuador and South Africa and the other drafted by Norway.[7]

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4. The UN Guiding Principles on Business and Human Rights were proposed by the UN Special Representative on business and human rights John Ruggie, and endorsed unanimously by the UN Human Rights Council.

5. In 2013, the Regional Forum on Business and Human Rights for Latin America and Caribbean Ecuador proposed a binding international legal tool enforcing the corporations' human rights violations.

6. See the 'Statement on Behalf of a Group of Countries at the 24th Session of the Human Rights Council', available online at <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> accessed 23 November 2014. The African Group, the Arabic Group Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru supported this declaration. Furthermore, more than 600 non-governmental organisations formed a 'treaty alliance' to support it. See <http://www.treatymovement.com> accessed on 25 November 2014. Yet large human rights NGOs such as Human Rights Watch and Amnesty International did not join this initiative. For Human Rights Watch, 'There need to be stronger human rights rules for business, but the UN's decision to move ahead with the development of an international treaty that only covers transnational corporations is compromised by the opposition of key governments and its narrow mandate. The UN's decision is too narrow since it only focuses on transnational corporations and will not address national or other businesses that should also be required to respect human rights.' See <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> accessed 27 November 2014.

7. The Resolution of Ecuador and South Africa, signed in addition by Bolivia, Cuba and Venezuela is available online at <http://business-humanrights.org/sites/default/files/media/documents/hrc-26_dr_bhr_ecuador.pdf> accessed 25 November 2014. Norway's resolution is available online at <http://www.norway-geneva.org/Humanrights/Statements/26th-Session-of-the-Human-Rights-Council/Item-3-Promotion-and-protection-of-human-rights/Business-and-Human-Rights-Resolution-/#.VHc_PIdzZD8> accessed 25 November 2014.

In a divided vote,[8] on the 26th of June 2014, the UN Human Rights Council adopted the resolution proposed by Ecuador and South Africa. Although the draft of the UN treaty is still being debated, the US and EU, together with Norway, have been openly voicing their opposition with threats of reducing their foreign direct investments.[9] Thus, it is only to be seen what kind of tool, if any, the UN will ultimately adopt. Until then, the multinational corporations are only directly bound by national legislation,[10] despite criticisms against the voluntary nature of obligations of companies proposed by the UN mechanisms, and their moral as well as legal foundations which should, otherwise, motivate the adoption of binding rules.[11] But why are the transnational corporations of a concern for human rights violations in the first place? And subsequently, why is it that the supposedly human rights-oriented states should oversee and enforce the human rights irrespective of where the atrocity took place?

In most of the cases, a powerful multinational company moves its production outside of its country of origin due to fundamental disparities in terms of cost of production. There, farther away from its own law enforcement bodies,

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8. Twenty states were in favour, namely: Algeria, Benin, Burkina Faso, China, Congo, Cuba, Ethiopia, India, Indonesia, Ivory Coast, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela and Vietnam. Fourteen states were against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Macedonia, Montenegro, Republic of Korea, Romania, United Kingdom and United States of America. Thirteen countries abstained: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates. More information available online at <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions > accessed on 27 November 2014.

9. Thalif Deen, 'After Losing Vote, *US-EU Threaten to Undermine Treaty' Inter Press Service News Agency* (United Nations, 28 June 2014) <http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/> accessed 25 November 2014.

10. ibid.

11. For a constructive criticism of the current stage of the international standards on business and human rights, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2014).

courts, and stockholders, a company exploits arguably weaker legal systems and governments that often do not provide sufficient protection for workers, children, women, rural communities, and others. In the worst-case scenario, a company is directly involved in mass atrocities, including torture, killings, genocide, war crimes or crimes against humanity.[12] Human rights violations involving corporations are widespread, and they represent the need for appropriate legal remedies, judicial and others, that are able to grasp the transnational nature of such violations. Yet none of the leading human rights jurisdictions hereafter analysed (United States, United Kingdom, and Australia) have offered one. The trend (employed by the US) is towards limiting (including importantly under procedural grounds) the ability of victims to use those forums as an adequate remedy.[13]

In this article, we highlight the recent jurisprudential developments of key human rights litigation involving corporations. First, we will analyse the US Alien Tort Claims Act 1789 (hereafter, ATCA 1789) and its related litigation. Then, we will highlight two essential grounds, on which the US Supreme Court has halted the corporate liability for human rights violations, namely (a) limitations to 'subject matter' jurisdiction and (b) 'general'

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12. Such allegations have been levelled against Shell and Chevron for their operations in Nigeria, or Exxon operations in Indonesia or BP in Colombia. For some of the cases filed in the US see *Doe v Unocal Corp* 963 F Supp 880, 883 (C.D. Cl. 1997) (alleging Unocal and Total SA of complicity in acts of torture, forced labor and forced relocation); *Rio Tinto Plc v Sarei*, (2013) 671 F.3d 736 (alleging that Rio Tinto, an Australian mining group, on the island of Bougainville in Papua New Guinea was complicit in war crimes and crimes against humanity committed by the army during a secessionist conflict). The case was dismissed on the 28th of June 2013 in the light of *Kiobel* case, decided by the US Supreme Court in April 2013 limiting the presumption of extraterritoriality of the Alien Tort Claims Act.

13. The UN Human Rights Council established a 'Working Group on the issue of human rights and transnational corporations and other business enterprises' (hereinafter UN Working Group). On April 10th 2012, the UN Working Group outlined as one of its strategic considerations '[t]he need for greater access by victims of business-related human rights abuse to effective remedies, which is urgent both in and of itself, as well as an important opportunity to drive implementation by setting the right incentives.' Office of the High Commissioner of Human Rights, *Report of the Working Group on the issue of human rights and transnational corporations*

jurisdiction.[14] Subsequently, we analyze the court's reasoning and present the effects of the decisions on the transnational corporate human rights litigation, and more importantly, which doors the US Supreme Court left open for future litigation. Furthermore, we explore alternative approaches and solutions in England and Australia. Ultimately, in light of the US, English and Australian reluctance on corporate liability, we invite the states to reflect on their own obligation to protect human rights and effectively regulate the activities of corporations that violate human rights in their extraterritorial operations.

II. ALIEN TORT CLAIMS ACT: BRIEF HISTORY & PRESENCE

The Alien Tort Claims Act (ATCA 1789) has its origins in the Judiciary Act of 1789 as one of the first laws enacted by the First Congress in 1789.[15] The aim of the Judiciary Act of 1789 was to guarantee the availability of criminal

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and other business enterprise (United Nations, HRC 2029) Available online <http://www.ohchr.org/ Documents/Issues/Business/ A.HRC.20.29 _ AEV.pdf> accessed 27 November 2014.

14. One of the most essential questions of law is whether a court has jurisdiction to decide a given case; (1) whether it has jurisdiction over the person (*in personam*) and (2) over the subject matter (*in rem*). In simple terms, the *subject matter jurisdiction* (often referred to as *general jurisdiction*) regards the jurisdiction over the issue/subject in controversy. Depending on the constitution or relevant procedural legislation the general jurisdiction may be granted to all courts or distributed among specialised courts. In the US the state courts have *general jurisdiction*, which means that they can hear any case except those prohibited by state law and those allocated to federal courts. For certain issues, the federal courts hold *exclusive jurisdiction* such as bankruptcy. The *personal jurisdiction* is the power of the case over the parties involved. Before a court can hear a case, it is required that the party has a certain minimum contact with the forum of the court, see *International Shoe v Washington* 326 US 310 (1945). *Personal jurisdiction* may be waive-able once the party appears before the court and does not object the lack of court's jurisdiction over it.

15. The ATCA 1789 was a direct response to enforce those international law rules that directly regulated individual conduct. See William Blackstone, *Commentaries on the Laws of England* (4th edn, G Chase 1923) 881. According to Blackstone: 'Offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against the law are principally incident to whole states or nations' in which case recourse can only be had to war... But where the individuals of any state violate this general law, it is then the interest as well as the duty of the government, under which they live, to animadvert upon them with a becoming severity that the peace of the world may be maintained.'

and civil remedies against individual violators of the '*law of nations.*'[16] The 'law of nations,' can be compared to today's customary international law.[17] Although the 'law of nations' in the late 18th century referred only to three offences, namely: violation of safe conduct, interference with ambassadors, and piracy on the high seas, the US Second Circuit after almost two centuries unexpectedly broadened the scope of the ATCA 1789 in the *Filartiga* case,[18] and thus, the applicability of the ATCA 1789 has been revived.[19]

The First Congress intended the ATCA 1789 to be a limited jurisdictional statute. However, in both the *Filartiga* and *Sosa v Alvarez Machain* cases,[20] the US courts acknowledged that the development in international law

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16. The original language of the statute (28 USCA §1350) reads that, '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' Also, at this point in time, the individual states had to communicate relevant international norms to their citizens and all others within their jurisdiction and consequently ensure that the violators of these norms were punished. See Anne-Marie Burley, 'The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor' (1989) 83 Am J Int'l L 461, 476; For more on 'law of nations', see Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, vol 4 (Hart Publishing 2004) 22–33.

17. Blackstone defines the law of nations as 'a system of rules... established by universal consent among the civilised inhabitance of the world; in order to decide all disputes which... must frequently occur between two or more independent nations, and the individuals belonging to each.' See Blackstone 66, William Blackstone, *Commentaries of the Laws of England: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979) .

18. The US Second Circuit court as well reflected on the definition of 'law of nations' in current setting. In the case of *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980) 886, the US Supreme Court did not ultimately resolve this knot, but settled with evolving standard for determining which torts are actionable under international law. Later, the cause of action in *Filartiga* was reaffirmed and extended in the Torture Victim Protection Act 1991, 28 USC §1350 App.

19. Although the *Filartiga* case is very unfortunate, it helped to start a new phase in the protection of human rights outside one's own borders. For more see a piece written by a brother of a victim of torture in Paraguay, Dolly Filártiga, 'American Courts, Global Justice' *NY Times* (New York, 30 March 2004) <http://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html> accessed 25 May 2014.

20. *Sosa v Alvarez-Machain*, 542 US 692 (2004). In Sosa, a Mexican national brought a claim against the US Drug Enforcement Agency (DEA) for allegedly violating his civil rights as the DEA kidnapped him in Mexico and brought him to trial to the US for the murder of a DEA agent. In this case, the first ATCA 1789 decided by the US Supreme Court, the court noted that ATCA 1789 was to be used only for a 'relatively modest

should be recognised in the ATCA 1789.[21] Despite the fact that the US Supreme Court in *Sosa v Alvarez-Machain* cautiously adopted a restrictive approach to possible causes of action under the ATCA 1789, the later US courts broadened the scope of the ATCA 1789 in instances when the human rights violation breached customary international law.[22] Some US courts have applied a stricter standard, under which a breach of 'the law of nations' has to be 'specific, universal and obligatorily condemned.'[23] However, this test does not emanate from international law. Thus, as a majority of US courts have confirmed, the courts should apply the dynamic definition of human rights protected by the 'law of nations.' Human rights, protected under the ATCA 1789, should be interpreted contemporarily and the concept should continue to develop.[24]

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set of actions alleging violations of the law of nations' and it advocated that federal courts should restrain themselves in constituting new causes of actions under ATCA 1789, see *Sosa v Alvarez-Machain*, 124 S Ct 2739, 2759-2761 (2004).

[21] See *Filartiga v Pena-Irala*, 630 F 2d 876, 884 (1980). In determining which sources were relevant to customary international law, the Second Circuit discussed the sources, from which customary international law could be derived, namely the usage of nations, judicial opinions, and the work of jurists. Citing the *Paquette Habana*, 175 US 677 (1900), which reaffirmed that 'where there is no treaty and no controlling executive or legislative at or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators... who have made themselves peculiarly well acquainted with the subject of which they treat.' Given the referral to 'universal renunciation in the modern usage and practice of nations,' the Second Circuit held that the district court had subject matter jurisdiction under the ATCA 1789. Although in the Sosa case, the US Supreme Court did not consider the 'illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment' as a violation of customary international law, the US Supreme Court instructed lower courts to consider whether international law extended the scope of liability for a given norm to the perpetrator being sued, if the defendant is a private actor, such as a corporation or individual, see *Sosa v Alvarez-Machain*, 542 US 692, 732 (2004).

[22] As *Filartiga* itself clearly stated. Jordan J Paust, 'Human Rights Responsibilities of Private Corporations' [2002] 35 Vand J Transnat'l L 801, 824.

[23] This standard has been particularly popular in the Ninth Circuit since *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987).

[24] Although there are some judges supporting originalist position, the majority of the US decisions support the dynamic and evolving concept of human rights. See *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) 812-16.

After reflecting on the *Filartiga* case, US Congress adopted the Torture Victim Protection Act 1992 (TVPA 1992) in 1992.[25] The TVPA allows victims of certain international law violations, or their representatives, to bring a civil suit against those responsible in federal district court. There has been some doubt whether the TVPA is applicable to corporations, given the *Beanal v Freeport-McMoran*[26] and *Sinaltrainal v Coca Cola*[27] cases. Nevertheless, in the light of recent case law, corporations are subject to the TVPA suit as Justice Kennedy's concurring opinion in the *Kiobel* case indicated (see below). Although the US Supreme Court still has not ruled on the issue.

In recent years, there has been considerable litigation connected to the ATCA 1789, where plaintiffs have wished to use this legal instrument as a human rights remedy for violations involving corporations. Consequently they face jurisdictional challenges, both as to the personal jurisdiction as well as the subject matter jurisdiction. Concerning the expanding personal jurisdiction, in 1995 the Second Circuit rendered a decision in *Kadic v Karadzic*, addressing for the first time the responsibility of non-state actors.[28] The court concluded that the international law applies to all actors, including private citizens.[29] Thus, this extends the application of the ATCA 1789 to corporate defendants. Since then, some have hoped that the US would become a battleground for litigating human rights violations involving

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25. Pub L 102-256 HR 2092.

26. *Beanal v Freeport-McMoran Inc*, 969 F Supp 362 (ED La 1997) 382-83, where the court found that the corporations could not be held liable and on appeal the Circuit Court did not explicitly state its opinion, see 197 F 3d 161 (CA5 La, 1999), 169.

27. *Sinaltrainal v Coca Cola* 256 F Supp 2d 1345 (SD Fla 2003) 1359 or *Estate of Rodriguez v Drummond* 256 F Supp 2d 1250 (WD Al 2003) 1266-67.

28. *Kadic v Karadzic* (1995) 70 F 3d 232. This case involved claims of extensive human rights abuses, including torture, war crimes and genocide against Radovan Karadzic.

29. ibid [241-43].

corporate entities,[30] given that the US is the only jurisdiction with a statute that creates a specific statutory claim for human rights violations.[31] Yet, this aspiration has been halted by the *Kiobel* case as far as extraterritoriality is concerned, and the *Daimler* case as it is related to general jurisdiction.

III. US LIMITATIONS TO TRANSNATIONAL LITIGATION: GENERAL JURISDICTION AND SUBJECT MATTER JURISDICTION

a. US Standard on General Jurisdiction: Goodyear and Daimler cases and the Unclear 'Exceptional Cases'

In the United States, general jurisdiction or all-purpose jurisdiction is currently governed by two recent US Supreme Court cases: *Goodyear Dunlop Tires Operations, SA v Brown*[32] and *Daimler AG v Bauman.*[33] Justice Ginsburg handed down both cases, before an unanimous court in *Goodyear*, and for a majority court in *Daimler AG* which included a combative concurring

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30. In *Doe I v Unocal Corp*, 963 F Supp 880, the district court found a corporation liable for acts of slavery and forced labor. In *Beanal v Freeport-McMoRan* 969 F Supp 3623, the district court held a company liable for genocide.

31. There are number of reasons, why the US represents such an appealing jurisdiction. One, the US rules on personal jurisdiction allow a plaintiff to sue an individual who is only temporarily present in the US, if they are served with a lawsuit during their stay (e.g. Pena Irala or Radovan Karadzic). Although the US is not the only legal system that recognises additional grounds for jurisdiction, the US procedural rules happen to function in a manner that permits civil human rights litigation brought by aliens, which took place in another country to proceed more easily than elsewhere. For more on the transnational jurisdictional systems, see Hans Smit, 'Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies' (1972) 21 Int'l & Comp LQ. Another reasons are the legal costs, possibility of contingency fees or liberal discovery procedure see Beth Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' (2000) 24 Hastings Int'l & Comp L Rev 410. In our opinion it is also the pursuit of jury trial and punitive damages that render the US court system more appealing.

32. US Supreme Court, *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011), decided on June 27th, 2011. All page numbers in this case from now on are from the following version, available at <http://supreme.justia.com/cases/federal/us/564/10-76/> accessed 27 May 2014.

33. *Daimler AG v Bauman*, 134 S Ct 746 (2014).

opinion by Justice Sotomayor, as detailed below. In these two cases, the US Supreme Court sets limits to general jurisdiction.

By general jurisdiction in the US, as opposed to jurisdiction derived from the specific controversy at stake, this article refers to 'instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities,'[34] as defined by the Court itself in *International Shoe Co v Washington*. In other words, as far as transnational human rights litigation is concerned, general jurisdiction is relevant once it allows state courts in the US to decide on causes of action that occurred elsewhere, (e.g. in foreign countries, as long as a certain connection between the corporate activities (usually, a local subsidiary) and the forum state can be established).

The *Goodyear* and *Daimler* cases explore exactly how close these connections need to be in order to justify general jurisdiction before state courts. In *Goodyear Dunlop Tires Operations, SA v Brown*, (*Goodyear* case) the background story concerns a bus accident in France caused by a defect in a tire produced by a foreign subsidiary of Goodyear USA in Turkey, which victimized two young boys originally from North Carolina. The transnational nature of this case is clear from its outset; the case enquires whether general jurisdiction before US state courts covers activities of foreign subsidiaries that occurred outside of the forum state, or of the US for that matter.

In the Court's words, the issue in the *Goodyear* case was defined as follows: 'are foreign subsidiaries of a United States parent corporation amenable to

[34] *International Shoe v State of Washington*, 326 US 310 (1945) 318.

suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?'[35] The legal basis of the *Goodyear* case was the Due Process Clause of the Fourteenth Amendment, within which the jurisdictional exercise 'over out-of-state corporation must comply with 'traditional notions of fair play and substantial justice.''[36] Such expression was first outlined in *Milliken v Meyer*[37] of 1940, and quoted by the Justices in *International Shoe*[38] and *Goodyear*.

In the *Goodyear* case, the US Supreme Court set a clear limitation to general jurisdiction. Notably, the Court established a 'continuous and systematic' standard (hereafter, *Goodyear* approach), as follows:

> A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.[39]

In the case the US Supreme Court held that courts in North Carolina could not exercise general jurisdiction since the commercialization in North Carolina of some tires produced abroad did not constitute a 'continuous and systematic' affiliation with the forum state. [40]

The *Daimler* case, decided on this terms, went a step further than *Goodyear* in setting further limits on general jurisdiction. As expressed by Cornett and Hoffheimer:

> Daimler AG [case] is a game changer. In advancing the policy goal of giving corporations

35. *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011), 1.

36. ibid, 2.

37. *Milliken v Meyer*, 311 US 457(1940) 463.

38. *International Shoe Co v Washington*, 326 US 310 (1945) 316.

39. *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011), 2.

40. ibid.

> the power to control states where they must answer legal claims, the Court shrinks the places of general jurisdiction against many large corporations to one or two states. The news media understandably greeted Daimler AG as restricting the existing law of personal jurisdiction.[41]

Accordingly, *Daimler* departs from the *Goodyear* approach, based on 'continuous and systematic' affiliations with the forum state, and then further restricts general jurisdiction rules.[42]

As far as its factual background is concerned, *Daimler* is an 'odd' case from a procedural standpoint. It concerned allegations of human rights violations, including illegal detention, torture and kidnapping, committed by Argentinian security agencies in collaboration with one of Daimler's subsidiary's in Argentina, during the Dirty War in the 70s-80s in that country against the plaintiffs, Argentinean workers at Daimler's subsidiary. The transnational nature of the case is clear: there are three countries involved; first, Germany, the place of incorporation of Daimler AG, where its main place of car manufacturing is located; second, Argentina, where the alleged violations took place in MB Argentina's plant, a subsidiary of Daimler AG; and finally, the United States, where the law suit was presented by connecting Mercedes Benz USA (MBUSA), a corporation from Delaware which serves as Daimler's indirect subsidiary, and California state, where MBUSA largely operates.

The plaintiffs chose California for two complementary reasons. First, as

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41. Judy M Cornett and Michael H Hoffheimer, 'Good-Bye Significant Contacts: General Personal Jurisdiction after Daimler AG v Bauman' [2014] Ohio St LJ, Forthcoming 1, 4.

42. As pointed out by Bernadette Bollas Genetin, 'In summary, Bauman has restricted general jurisdiction primarily to a corporation's states of incorporation and principal place of business. It has, moreover, indicated that a defendant's 'continuous and systematic' forum contacts will rarely arise to the level of general jurisdiction.' In: Bernadette Bollas Genetin, 'The Supreme Court's New Approach to Personal Jurisdiction' [2015] SMU L Rev forthcoming, U of Akron Legal Studies Research Paper No 14-05, 35.

Justice Ginsburg notes in *Daimler*, 'under California's long-arm statute, California state courts may exercise personal jurisdiction 'on any basis not inconsistent with the Constitution of this state or of the United States.'[43] Second, as pointed out in an amicus brief by the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*, DIMR) presented in the *Daimler* case, the most convenient forum would be the US, since 'German courts would apply the harsh limitation period of the '*lex loci damni*', and German law imposes additional logistical and financial hurdles on non-European plaintiffs that effectively close off the German courts to the respondents in this case.'[44]

In *Daimler*, there was a debate between Justice Ginsburg writing for the majority of the Court and Justice Sotomayor in her concurring opinion regarding what was the very issue at stake in the case.[45] The Court had granted a quashing order in *Daimler* to address the following question: 'whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.'[46] Framing the issue like this, in light of Sotomayor's concurring opinion, would have led the Court to a more individualised enquiry on the extent of MBUSA's contacts in California in order to establish that California serves as a forum state as far as those contacts are imputable to

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43. *Daimler AG v Bauman*, 134 S Ct. 746 (2014), 6 (Justice Ginsburg).

44. Brief of the Amici Curiae German Institute for Human Rights and Other German Legal Experts in Support of Respondents, *Daimler AG v Bauman*, 134 S Ct. 746 (2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/11-965-bsac-German-Institute-for-Human-Rights-and-other-German-Legal-Experts.pdf> accessed 27 May 2014.

45. For a snapshot of this debate see footnote 16 in Justice Ginsburg's opinion, in: US Supreme Court, *Daimler AG v Bauman*, 134 S Ct 746 (2014), 18.

46. *Daimler AG v Bauman*, 134 S Ct 746, 766 (2014) (Justice Sotomayor).

Daimler.

Yet the Court went further and analysed whether in general Daimler is 'at home' or not in California. Justice Ginsburg justifies this approach in light of the *Goodyear* standard. While deciding generally on all eventual general jurisdiction cases in California against *Daimler*, Justice Ginsburg states that 'in short, and in light of our path marking opinion in *Goodyear*, we perceive no unfairness in deciding today that California is not an all-purpose forum for claims against Daimler.'[47] Such a broad framing of the issue at stake in Daimler was subject to heavy criticism outside of the courtroom by legal commentators[48] in the aftermath, as well as from the judicial bench with Justice Sotomayor's qualification of this approach as a 'deep injustice.'[49]

In responding to the issue framed as to whether Daimler is 'at home', in light of *Goodyear*, in California, Justice Ginsburg strikes a clear-cut limit to the exercise of state jurisdiction. The governing part of her opinion is that:

> With respect to a corporation, the place of incorporation and principal place of business are 'paradigm bases for general jurisdiction.' (...) Those affiliations have the virtue of being unique – that is, each ordinarily indicates only one place – as well as easily ascertainable.[50]

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47. *Daimler AG v Bauman*, 134 S Ct 746, 760 (2014), footnote 16 (Justice Ginsburg).

48. As William Baude puts it: 'Readers of the Supreme Court's decision yesterday in Daimler Chrysler v. Bauman may have learned two things: First, it is increasingly difficult to establish general jurisdiction over a corporation for conduct unrelated to the forum; second, the Court ultimately resolves the issue it wants to, which may not be the one the parties focused on,' In: William Baude, 'Opinion recap: A stricter view of general jurisdiction' *SCOTUSblog* (US 15 Jan 2014) <http://www.scotusblog.com/2014/01/opinion-recap-a-stricter-view-of-general-jurisdiction/> accessed 27 May 2014.

49. For Justice Sotomayor, injustice lies on the fact that: 'the majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries,' *Daimler AG v Bauman*, 134 S Ct 746, 772 (2014) (Justice Sotomayor).

50. *Daimler AG v Bauman*, 134 S Ct 746, 760 (2014) (Justice Ginsburg).

With those words, Justice Ginsburg sets a clear shift in the general jurisdiction approach in the US: it indicates it is not enough anymore to have 'continuous and systematic' affiliations with the forum state as in *Goodyear*, but rather the place of incorporation and principal place of business which would serve as clear-cut paradigms.

Yet here comes the tricky part of the *Daimler* standard advanced by the court. Although the post-*Daimler* literature has established that those paradigms constitute the current standard in terms of general jurisdiction,[51] Justice Ginsburg made it clear, although in a footnote, the possibility of 'an exceptional case', in the following words:

> We do not foreclose the possibility that in an exceptional case, (...), a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.[52]

From the standpoint of transnational human rights violations claims brought using the ATCA 1789, the *Daimler* approach, by restricting general jurisdiction primarily to the place of incorporation or to the principal place of business, leaving aside exceptional cases, brings a series of difficulties for future applicants. First, although the Court in *Daimler* sought to clarify the *Goodyear* standard, it left an undefined[53] category of ATCA 1789 exceptional cases. In this category, US state courts could exercise under the Due Process Clause general jurisdiction, even when the respective state forum is not the

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51. Cornett and Hoffheimer (n 44).

52. *Daimler AG v. Bauman*, 134 S Ct 746, 761 (2014), footnote 19 (Justice Ginsburg).

53. As Donald Earl Childress III puts it: '[One of the criticism is that] the Court did not define the term 'exceptional circumstances.' Of course, one wonders whether what is 'exceptional' is in the eye of the district court. This thus presents the possibility for creative lawyering and continued uses of general jurisdiction beyond what the Court appears to intend,' In: Donald Earl Childress III, 'General Jurisdiction after Bauman' (2014) 66 Vanderbilt Law Review En Banc 197, 202.

place of incorporation or the main place of business for the company. The question of what kind of cases would fit into this category remains open.

Second, upon reading Justices Ginsburg and Sotomayor's exchange in the *Daimler* case, it becomes clear that the US Supreme Court approach to general jurisdiction, in particular in cases involving large companies, has been dancing around two background issues: first, how to approach the matter of being at home in a world with large multinationals that can be considered either at home anywhere or nowhere; and second, how to conceptualize legal certainty in the current economic scenario of global companies. This is particularly relevant in light of the ATCA 1789 and its use as a remedy for worldwide human rights violations involving companies.

In this sense, Justice Ginsburg seems to be worried, in light of the Due Process Clause of the Fourteenth Amendment, with the lack of legal certainty in terms of general jurisdiction. Justice Ginsburg is explicit in this regard by stating that:

> exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[54]

In an ironic reply, Justice Sotomayor recalls that 'Americans have grown accustomed to the concept of multinational corporations that are supposedly 'too big to fail'; today, the Court deems Daimler 'too big for general jurisdiction.''[55]

This exchange reveals a judicial search for certainty, by focusing on local

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[54] *Daimler AG v Bauman*, 134 S Ct 746, 761 (2014) (Justice Ginsburg).

[55] *Daimler AG v Bauman*, 134 S Ct 746, 764 (2014) (Justice Sotomayor).

paradigms of the corporate 'home', while struggling with increasingly spread corporations. In a sharp critique to the *Daimler* decision, Cornet and Hoffheimer defies Justice Ginsburg's approach by stating that:

> [W]hile her opinions restricting general jurisdiction evidence concern for the burdens facing corporations, they express no similar concern for the hardships they will impose on injured individuals. In a rush to protect defendants from the perceived evils of forum shopping, the Court gives corporations unprecedented power to predetermine what states or countries they can be sued in—and what law will apply against them.[56]

This suggests that a human rights approach to corporate responsibly would have led the court, at least, to also take into consideration the lack of access to justice and the problems regarding legal certainty for victims rather than focusing solely on the corporations.

b. US Standard on Subject Matter Jurisdiction: Kiobel case

A further limitation to transnational litigation regarding human rights violations involving companies is related to 'subject matter jurisdiction'. Again, in a previous case, *Kiobel v Royal Dutch Petroleum Co*,[57] decided in April 2013, the US Supreme Court rejects the trend towards using the ATCA 1789 as a transnational remedy for human rights violations. As seen above, *Daimler* imposes restrictions to general jurisdiction, by relying on local approaches to jurisdiction (main place of business or of incorporation).

In *Kiobel*, the question was different from the *Daimler* case. Yet, the rejection of the transnational nature of the ATCA 1789 persists. The former case concentrated on subject matter jurisdiction, in particular, on the extraterritorial application of the ATCA 1789. Accordingly, in *Kiobel*, the

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56. Cornett and Hoffheimer (n 44) 5.

57. *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013).

Court framed the issue in the following terms; 'the question presented is whether and under what circumstances courts may recognise a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.'[58] The factual background in *Kiobel* concerns allegations that non-US companies aided and abetted the Nigerian government in committing human rights violations in Nigeria through oil exploration. The petitioners were aliens that now live in the US after being granted asylum.

Chief Justice Roberts, authoring the *Kiobel* decision, adopts a strictly originalist approach to the question of extraterritorial application of the ATCA 1789. Here, an originalist approach is defined as the method of constitutional interpretation that seeks the original intent of the normative text at stake.[59] Apart from the furious debate originalism has produced among constitutional scholars,[60] the US Supreme Court has often sought to establish the original intent of a legal provision, by consulting historical documents, such as the files of the First Congress which adopted the ATCA 1789 in order to assess what the framers of certain provision intended with its adoption.

This established the holding in *Kiobel*, which strikes as a prime example of originalist interpretation. After rejecting a textual reading of the expression 'law of nations' as incorporating an extraterritorial approach to the ATCA 1789,[61] Chief Justice Roberts holds, writing for the Court, that the text

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58. ibid.

59. ibid.

60. For a defence of originalism, see: Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849. For a critique of originalism, see for instance: Robert C Post and Reva B Siegel, 'Originalism as a Political Practice : The Right's Living Constitution' (2006) 75 Fordham Law Review 545.

61. According to the Chief Justice Roberts: 'To begin, nothing in the text of the statute suggests that Congress

and the history of the ATCA 1789 does not overcome the 'presumption against territoriality.'[62] Chief Justice Roberts arrives at this conclusion by emphatically supporting an originalist approach to the ATCA 1789, reading 'law of nations' as concerned primarily with 'violation of safe conducts, infringement of the rights of ambassadors, and piracy.'[63] Reading this provision in such an originalist way, the Court sees that nothing in the ATCA 1789 overcomes the presumption against its extraterritorial application.

Yet, the Court went further by leaving an important door open for future litigation. At least, three aspects in *Kiobel* signal that the ATCA 1789 might otherwise be applied extraterritorially and that certainly it applies to US companies. First, Chief Justice Roberts established a 'touch and concern the territory of the United States'[64] standard. In this sense, a future case might be able to prove that it is related (or touches and concerns) to the US to the necessary extent, overcoming the presumption against the extraterritorial application of the ATCA 1789. Accordingly, as the literature has come to recognise,[65] *Kiobel* does not prevent holding US companies accountable for their actions against aliens that violate the law of nations (leaving aside the difficulty of convincing the court that this legal category includes international

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intended causes of action recognised under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches 'any civil action' suggest application to torts committed abroad; it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality.' *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013), 7.

62. ibid.

63. *Kiobel v Royal Dutch Petroleum Co*, 133 S.Ct. 1659 (2013), 8.

64. *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013), 14.

65. According to Beth Stephens, for instance: 'Holding U.S. citizens accountable for violations of international law, no matter where committed, would not have a negative impact on foreign affairs. Similarly, denying safe haven to non-citizens who have relocated to the United States is consistent with U.S. foreign policy interests,' Beth Stephens, 'Extraterritoriality and Human Rights After Kiobel' (2013) 28 Md J Int'l L 256, 273.

human rights law or part of it). Second, Justice Kennedy, in his very brief concurring opinion, is clear that future cases might apply extraterritorially in line with the Torture Victim Protection Act of 1991, even when 'other cases may arise with allegations of serious violations of international law principles protecting persons.'[66] Third, in their concurring opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, make it clear which cases were primarily addressed by the ATCA 1789. Accordingly, they list the necessary conditions as follows:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[67]

Apart from Justice Breyer's concern with impunity of human rights violators, it is possible to infer from *Kiobel*, as much as from *Daimler*, that the Court struggles with the transnational nature of human rights violations. Chief Justice Roberts' focus on interests that 'touch and concern' US territory, as a reference point for ATCA 1789-based human rights litigation, is both imprecise and not solidly grounded. Of course, it is clear that US companies are still liable for human rights violations even under a narrow reading of *Kiobel*, yet the court fails to strike a balance between human rights as being one of the core concerns of contemporary US foreign policy and the impunity of alleged human rights violators worldwide. The court, again in *Kiobel*, goes local: it grounds its argumentation in US interests and history in an originalist way, thus avoiding the need to address in a serious manner the transnational nature of human rights violations. Yet *Kiobel*'s 'touch and concern', as much as *Daimler*'s 'exceptional circumstances,' leaves the door

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66. *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013), 1 (Justice Kennedy).

67. *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013), 7.

partially open for transnational human rights litigation, despite the further obstacles both approaches pose for future litigators.

IV. ALTERNATIVE APPROACHES

When researching other possible venues for transnational human rights violations, the intuition leads towards other common law countries as England, Canada, South Africa or Australia. In this article, we focused on two countries, England and Australia. Countries, where some issues of transnational human rights litigation have already arisen, but with no significant result.[68] Yet in light of *Daimler* and *Kiobel* we have spotted in each jurisdiction some particularities which could serve as a source for other jurisdictions when enforcing human rights, irrespective of the perpetrator.

a. England

England has not been extensively exposed to transnational corporate human rights litigation. Yet English courts can exercise their extraterritorial jurisdiction for actions of English companies, as well as of non-English companies, that carry out business 'to a definite and, to some reasonable extent, permanent place'[69] within English jurisdiction. In England, a foreign company is deemed present within the jurisdiction if it has a business establishment there,[70] regardless of whether the claim is directly connected

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68. The UK has adopted for transnational tort cases the Private International Law Miscellaneous Provisions Act 1995, under which there have been number of cases brought against the British TNCs. Yet the application of this Act is limited. See generally Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 113-117.

69. *Littauer Glove Corp v F W Millington* (1920) Ltd (1928) 44 TLR 746 (KB Div) 747 and *Adams v Cape Industries* [1990] Ch 433 (CA) 468.

70. *Adams v Cape Industries* [1990] Ch 433 (CA), 469.

to this establishment.[71] In a very old case from the beginning of 20th century, the court, in order to show the connection with England, had been satisfied with the presence of the company in England for nine days while it had been participating in an exhibition in London.[72] Furthermore, a foreign corporation may be exposed to the English legal system via its agent or subsidiary.[73] Thus, although English courts seem to have more extraterritorial power than the US courts, given the US' stricter application of due process standard which requires closer ties between the US and the foreign corporate activities at stake, as demonstrated in *Goodyear* and *Daimler* for the establishment of jurisdiction, they also have to take into consideration the jurisprudence of the Court of Justice of the European Union.[74]

Moreover, even if the corporation has a branch or a subsidiary in England, the *forum non conviniens* doctrine (hereinafter 'FNC') will be consequently applied. According to the *Spiliada* case, English courts will dismiss the case if 'another available forum, having competent jurisdiction, which is the more appropriate forum' exists.[75] In their determination of 'the more appropriate forum,' English courts adopted a three-element test. First, courts take into account the parties and their interests. Second, they assess

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[71] Companies Act 2006 and the Overseas Companies Regulation 2009, ss 34, 37.

[72] *Dunlop Pneumatic Tyre Co Ltd v Actien-Gesellschaft für Motor und Motorfahrzeugbau Vorm Cudell & Co* [1902] 1 KB 342 (CA).

[73] Arnaud Nuyts, 'Study on Residual Jurisdiction: General Report' (2007) 36 et seq <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed on 27 May 2014.

[74] Case C-281/02 *Andrew Owusu v NB Jackson*, 2005 ECR OJ C 106, para. 42, according to which a defendant has to foresee before which court it may be sued.

[75] *Spiliada Maritime Corp v Cansulex* [1987] AC 460 (HL). Under the English FNC, it has to be shown that some other forum is clearly more appropriate. Even if this 'appropriateness' is only limited time-wise. Even if the forum would not otherwise have a jurisdiction, it will be deemed available (see *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL).

the nature of the subject matter. Third, courts reflect whether 'substantive justice' will be achieved in that other forum.[76] The third part of the test is from our perspective the most important, and in the *Kiobel* and *Daimler* cases indicate the US Supreme Court's failure to reflect on this important aspect and if one concedes they did, for the sake of the argument, it was more in terms of providing legal certainty to the corporation rather than any substantial consideration regarding access to justice of the victims, as detailed above. Seeking justice has been one of the fundamental policy reasons for adopting the ATCA 1789, and yet it has virtually disappeared from the inks of the Justices of the US Supreme Court.[77]

b. Australia

The Australian legal system is from many perspectives similar to the English. Yet the waters of transnational human rights litigation remain fairly untested given the current status of Australian law. In this part, we briefly reflect on a few issues, which render Australia, to certain extent, unattainable for human rights litigation.

First of all, Australia does not consider customary international law as a part of its common law.[78] Thus, a statute providing action on the basis of corporate human rights violations has to be adopted in order to allow

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76. *Spiliada Maritime Corp v Cansulex* [1987] AC 476 (HL). Recently, two cases have emphasised the significance of the 'justice' limb, see *Connelly v RTZ* [1998] AC 854 (HL) and Lubbe et al v Cape plc [2000] 4 All ER 268 (HL).

77. The ATCA 1789 enabled foreign citizen so seek justice for injuries caused by state parties, see Richard L Herz, *The liberalizing Effects of Tort: How Corporate Liability Under the Alien Tort Statute Advances Constructive Engagement* (2008) 21 Harv Hum Rts J 207, 211.

78. *Nulyarimma v Thompson* (1999) 96 FCR 153 (FCA).

transnational human rights litigation. Accordingly, such a bill, the Corporate Code of Conduct Bill was introduced in the Australian Senate on September 6th 2000.[79] Yet this statute did not pass and in addition the Parliamentary Joint Statutory Committee on Corporations and Securities found the Bill to be 'impracticable, unworkable, unnecessary and unwarranted.'[80] Therefore, the only claims which can be submitted to the Australian courts are statute-specific, e.g. environmental law. In connection to environmental protection, an Australian company, BHP, was sued in 1997 for water pollution in Papua New Guinea.[81] Although, the case had been settled, the defendant did not seek dismissal on the grounds of forum non conveniens, given that Australia applies a higher standard of this doctrine. The defendant has to prove that Australia is 'clearly [an] inappropriate forum' in order to stay the proceeding.[82] Thus, once the Parliament of Australia decides that the issue of human rights protection by the corporation is of a 'practicable, workable, necessary and warranted' nature, the courts will be most likely able to hear a case. The Australian rule on the choice of law may remain a challenge, given that the court applies the site of the tort as applicable law in all foreign tort cases.[83]

In conclusion, unless the Parliament of Australia actively engages its role in

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79. Corporate Code of Conduct Bill (2000-2002) Available at <http://www.comlaw.gov.au/Details/C2004B01333> accessed 28 May 2014.

80. More on the Australian Corporate Code of Conduct Bill see Surya Deva, 'Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations' (2004) 8 Newcastle L Rev 87.

81. *Dagi v BHP* [1995] 1 VR 428 (SCt Vic).

82. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

83. *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (HCA) 520. Some courts have emphasised the consideration of the acts causing an injury while others the place of injury. See e.g. *Puttick v Tenon Ltd* (2008) 83 ALJR 93.

human rights protection, vis-à-vis corporate violations, victims will remain with limited legal remedies.

V. CONCLUSION

Each and every state has a clear human rights obligation to place an effective restraint on activities within its territory that violate human rights[84] and to those individuals who are subject to a state's jurisdiction.[85] As emphasised in *Daimler* and *Kiobel*, these were not conventional cases. Yet the decisions were protective of the US judicial system and US interest and not of human rights, contrary to the repeatedly declared US foreign policy's priority to protect human rights.[86] Nevertheless, in both cases, the Court left the door partially open for future cases to be analysed – cases which would be less procedurally problematic if plaintiffs are able to frame their cases as exceptional ones as explained above.

Furthermore, in *Kiobel* the US Supreme Court underlines the local character of these proceedings, by confirming a strict presumption against

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84. See e.g. Article 2 of both the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966. Moreover, there are number of articles devoted to the responsibility of home state for violation of human rights by its companies, e.g. Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Y LJ 443; M Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in C Scott (ed), *Torture as Tort* (Hart Publishing 2001); Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598.

85. See e.g. Inter-American Commission on Human Rights 1959, art 1(1); of the International Covenant on Civil and Political Right 1976, art 2(1).

86. Many US departments and organizations have repeatedly emphasised the importance of protection of human rights. Eg. the US Department of State established Bureau of Democracy, Human Rights, and Labor promoting human rights around the world. Nevertheless, the US Supreme Court has repeatedly decided not to serve as a tool for such promotion and protection.

extraterritoriality in *Daimler*, the court refers to the place of incorporation or principal place of business as main reference points for general jurisdiction. Yet, which business operates today from exclusively one place? The narrow approach that the Court has undertaken contravenes worldwide integration, the nature of present global business. In most cases, the defendants are not small of medium-sized companies. They are all multinational companies operating in almost all continents. The place of incorporation is only a formal requirement and business operations may even be carried out in 'the cloud'. Thus, the court should have been more flexible, rather than restrictive and more sensitive than formalistic.

Moreover, the argument of the US Supreme Court in *Daimler* regarding limiting the court's jurisdiction by the Due Process Clause of the US Constitution seems highly arbitrary in light of other procedural rules.[87] Of course, a corporation has to know where it can be sued, yet US courts should also reflect better on the transnational nature of human rights violations involving corporations today, and consequently consider the lack of judicial remedies victims often face, as emphasised by the UN Resolution of June 26th 2014.

Presuming that the UN will not be in a position to adopt a 'Business and Human Rights Treaty,' the individual states should ultimately follow their own advice. As the UK delegate stated during the UN Human Rights Council in June 2014, 'this issue is one of the rule of law, the national rule

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87. In the US under its federal procedural rules an alien can be sued only on the basis of his or her presence on the US soil, See eg *Burnham v Superior Court of California* 495 US 604 (1990). Under certain circumstances, having a property in the US as well provides jurisdiction to US court over a person, see *Shaffer v Heitner* 433 US 186 (1977), where the US Supreme Court held that in case of assertion of jurisdiction over defendant's property has to also meet the standard of 'minimum contacts'. Yet left open the question whether owning the property as a sole reason would grant jurisdiction to the court.

of law in individual states.'[88] Human rights should be protected on all levels, international, national and local. As multinational corporations become more globally powerful and literally omnipresent, so should the rule of law and protection and enforcement of human rights. As far as the jurisdictions have been analysed are concerned, developed countries' legal systems seem to challenge human rights advocates to 'catch them if they can.' In relation to transitional litigation on human rights, those advocates have not seen the light of the rule of law proudly andoften rhetorically professed within the legal circles in the Global North.

88. UN Web TV, 'Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights', *United Nations* (26 June 2014) HRC 26 L22 <http://webtv.un.org/search/ahrc261.22rev.1-vote-item3-37th-meeting-26th-regulat-session-human-rights-council/3643474571001?term=humanrights%20council&cort=date> accessed 23 November 2014. The ICC also states in a press release that 'no initiative or standard with regard to business and human rights can replace the primary role of the state and national laws in this area.' International Chamber of Commerce, 'ICC disappointed by Ecuador Initiative adoption' *International Chamber of Commerce* (Paris, 20 June 2014) <http://www.iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/> accessed 24 November 2014.

Secret Courts, Justice and Security: Is the use of CMPs a double-edged sword?

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I. INTRODUCTION

Under a Closed Material Procedure (CMP), a tribunal or court receives evidence or material from one party[1] that remains undisclosed to the other parties while still allowing the court and the party in whose possession the material is to rely on the said material. CMPs are now an increasing feature in cases ranging from immigration, employment and planning proceedings to matters involving the foremost subject of national security. It must be noted that such procedures are an exception to the rule of law and the common law tradition. Lord Denning succinctly propounded; '...if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'[2] Yet, the UK Supreme Court dealt with no fewer than six CMPs related cases in its first 30 months.[3]

In light of the Justice and Security Act 2013[4] (JSA 2013) coming into force,

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1. The party making the application for the case to be heard in a CMP.

2. *Kanda v Government of Malaya* [1962] AC 332.

3. Michael Fordham, 'Secrecy, Security and Fair Trials: The UK constitution in Transition' (2012) 17 JR 187, 3.

4. HM Government, Justice and Security Act 2013.

the question is whether CMPs are actually required, and if so, should they be extended beyond national security claims to civil litigation claims?

This essay will outline the existing and potential contradictions caused by the use of CMPs, as well as the arguments put forward by the government in justifying its need to pursue and further extend CMPs. The Justice and Security Bill ('Bill')[5] provoked important discussions, some of which have been laid to rest by the Act. The JSA 2013 has generated some case law despite only coming into force a few years ago, which reflects a trend of the courts. It will be seen, in the course of this article that the Courts have leaned towards the more practical approach of protecting national security interests.

II. BACKGROUND

CMPs developed from the landmark European Court of Human Rights (ECtHR) case of *Chahal v United Kingdom*.[6] Chahal was denied access to the underlying materials used by the British executive to detain him within the UK. The Strasbourg Court allowed the appeal of Chahal on grounds of violation of article 3 and 5(4) of the ECHR. The Court then observed that the Canadian system of dealing with sensitive material in court was a 'more effective form of judicial control'[7] and that a '...substantial measure of procedural justice'[8] must be kept in mind while balancing national security concerns.[9] The UK Home office wanted to deport Mr Chahal to India for

5. The Act originated in Justice and Security Green Paper, published on 3 October 2011, which later became the Justice and Security Bill 2012-13.

6. *Chahal v United Kingdom* (1996) ECHR 413.

7. ibid [131].

8. ibid.

9. ibid.

certain security reasons. At the time, the law in the UK did not allow for any appeal of such a deportation order and only permitted the right to have the order reviewed by an Advisory Panel, whose opinion was not binding on the Home Secretary. The Home Secretary could decide how much information would be released to the person being deported and he did not have to provide any reasons for the same. The UK Government lost the case in the ECtHR as the Court found that these procedures in the UK were in breach of articles 5(4)[10] and 13[11] of the Convention. The UK procedure was incompatible with article 5(4) as the Advisory Panel was not considered to be a 'Court'. This gave rise to the creation of a quasi-judicial body in the UK called the Special Immigration Appeals Commission (SIAC).[12]

Recently, the Supreme Court in *Al Rawi*[13] defined closed material procedures as a process where a party is permitted to withhold disclosure of certain sensitive material from the other parties, and in such cases, the court permits disclosure to an appointed 'special advocate' (representing the other parties) and where appropriate, the court itself.[14] This withheld material is referred to as closed material and for it to be termed as so, such material must be contrary to public interest.[15] 'Public interest' for the purposes of this definition was said to include matters affecting national security, international relations of the UK, the prevention or detection of crime and any other circumstances where disclosure is likely to harm the

10. Article 5(4) says that anybody who is detained (Mr Chahal was detained prior to being deported) is entitled to have his order of detention 'decided speedily by a court.'

11. Article 13 provides for 'an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

12. Special Immigration Appeals Commission Act 1997 (SIAC).

13. *Al Rawi v The Security Service* [2011] UKSC 34.

14. ibid [2] (Neuberger MR).

15. ibid.

public interest.[16] Amnesty International was particularly concerned that this definition of public interest had a very wide import and would facilitate extensive use of the CMP mechanism even in cases where the State need not employ it.[17] They felt that this blanket protection would be tantamount to a 'very real impediment to securing genuine accountability for human rights violations.'[18] This was an area that deeply concerned various international human rights organisations. The entrenched principle of open justice, which affords a party the right to know information leveled against them was being compromised for a supposed greater good. The main tug of war in this CMP debate is between the preservation of open and natural justice on the one hand, and the protection of national security interests on the other.

III. OPEN JUSTICE AND THE PII PROCEDURE

The open justice principle encompasses the rights of all parties subject to legal proceedings, together with those of the media and public, in promulgating a uniform public hearing that ensures no man or state organ is above the law, and that every man is held accountable for his actions.[19] Open justice is a cardinal principle of our legal jurisprudence and is essential in the conducting of a fair trial. Open justice has been regarded as a constitutional principle[20] from the early times of *Scott v Scott*,[21] where in-camera proceedings were held to be a violation of justice.[22] The above rationale allows for confidence

16. ibid [2] (Neuberger MR).

17. Amnesty was particularly worried about 'de-facto claim to secrecy for the Security and Intelligence Services by allowing all material originated or handled by them to be automatically defined as 'sensitive' and so presumably placed into a closed session.' Page 6 of the Amnesty International UK response January 2012.

18. ibid.

19. *Attorney-General v Leveller Magazine* [1979] AC 440, 45 (Lord Diplock).

20. *Tariq v Home Offic*e [2011] UKSC 35 [2012] 1 AC 452, [108-9] (Lord Brown).

21. *Scott v Scott* [1913] AC 417 (Lord Shaw of Dunfermline).

22. ibid.

in the administration of justice.

The principle of open justice allows the accused to know, in entirety, the case of the opponent against him, and therefore allows him to present his defense to all the averments sought by his opponent. Open justice also includes a larger intangible benefit, which is that the public is educated and informed by the open information. This generates a further social benefit of 'public confidence in the integrity of the court system and understanding of the administration of justice.'[23] The Chief Justice of Canada, Beverly McLachlin PC, in response to a question on whether open justice included accessibility to information, said very simply, 'the law belongs to the people.'[24] The use of secret evidence is prima facie irreconcilable with the principles of open justice, and as Lord Atkin famously remarked, 'justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful...comments of ordinary men.'[25]

However, the exception to the principle of open justice was expounded in the seminal case of *Conway v Rimmer*,[26] through the concept known as Public Interest Immunity (PII). The modern origins of the procedure can be traced to the case of *Duncan v Cammell Laird*,[27] a Second World War case where 99 servicemen were killed during a submarine test and their next of kin decided to sue the manufacturers for negligence in design. The Admiralty intervened and certified[28] the submarine's design plans and the House of

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23. *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175, 185 (Justice Dickson).

24. Openness and the Rule of Law, Remarks of the Rt Hon Beverly McLachlin Chief Justice of Canada, at the Annual International Rule of Law lecture series 10th January 2014.

25. *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322.

26. *Conway v Rimmer* [1968] AC 910.

27. *Duncan v Cammell Laird* [1942] AC 624.

28. Equivalent to a ministerial certificate.

Lords held that a court of law has no business questioning such a ministerial certificate.[29] However, the court soon overruled this approach. In *Conway v Rimmer*, a case on an employment dispute rather than national security, the House of Lords held that such a blanket protection (by way of a ministerial certificate) cannot be allowed in civil litigation and the Court would be the ultimate arbiter of whether any material should be disclosed or not. Under the present system of PII, if a party to litigation claims that they are not under an obligation to disclose certain material, the court must carry out a judicial balancing exercise, known as the 'Wiley balance,'[30] between the value of public interest in non-disclosure vis-à-vis that in disclosure, ie. in the administration of justice. Although the *Wiley balance* originates from *Conway v Rimmer*, it was only in 1996 that the government announced a crucial change in procedure, where 'class' protection[31] would be done away with and all claims henceforth would be scrutinised to assess the real harm caused to public interest in the disclosure of the material.[32] The Wiley balance requires the public authority in question (such as the minister in the *Wiley* case) to consider the aforementioned competing public interest in disclosure and non-disclosure and give a certificate to that effect to the court.[33] Thereafter, the court decides whether disclosure should be withheld or whether an alternative to full disclosure exists.[34] The Wiley balance is not being applied to the application of CMPs under the current statutes-

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29. However, the Lords allowed the negligence claim to proceed on merits and later found that no negligence had been committed.

30. *R v Chief Constable of West Midlands, ex parte Wiley* [1995] 1 AC 274.

31. Before 1996, documents such as Ministerial minutes, were a class of documents that could never be disclosed even if the content of those documents was completely harmless. *Conway v Rimmer* [1968] AC 910, 952 (Lord Reid).

32. See Adam Tomkins, *The Constitution after Scott* (OUP 1998) 197-9.

33. A Tomkins, 'Justice and Security in the United Kingdom,' 47 Israel L Rev 3, 6.

34. See *R (Serdar Mohamed) v Secretary of State for Defence* [2012] EWHC 3454.

particularly SIAC[35] (under the Terrorism and Prevention Investigation Measures Act 2011) and in the Investigatory Powers Tribunals (IPT). The procedure followed by the IPT is much stricter than that of the SIAC. In the IPT, there is a blanket protection on disclosure of all sensitive or secret material irrespective of whether its contents are considered to be non-harmful.[36] Furthermore, if a claim is rejected by the IPT, no reasons are supplied.[37]

At this point, a clear distinction must be drawn between undisclosed material and closed material (secret evidence); the former concept is one where the judge or decision maker is not made privy to the said material while reaching a conclusion. Therefore, in a PII case, the material (in its entirety) that is removed from the proceedings is undisclosed material. In the case of secret evidence, the material is admitted on the record if it has been relied on and does not need to be disclosed to the suspect. Thus, in a PII case, the information contained in the undisclosed material is less significant, though not insignificant, as it could potentially contain exculpatory material.

The two significant differences between the two procedures are: (a) in PII cases, the court conducts a balancing exercise between the competing public interests, while in a CMP, absent any equivalent balancing exercise, the court's task is to exclude any material that may harm public interest; and (b) in PII cases, if the balance tilts towards non-disclosure, the material is

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35. The Special Immigration Appeals Commission (SIAC) was created by the Special Immigration Appeals Commission Act 1997. It deals with appeals in cases where the Home Secretary exercises their statutory powers to deprive an individual of their British citizenship, deport an individual from the UK, or revoke an individual's immigration status on the basis of withheld material, the disclosure of which would jeopardise either national security and/or the relationship between the UK and some other country.

36. See IPT Ruling on Article 6 IPT/01/62 and IPT/01/77, 23 Jan. 2003.

37. ibid.

excluded from the trial altogether whereas in a CMP, the 'closed' material still remains available to the court and can be relied on by one party.[38]

Prima facie, the equality or fairness balance tilts towards the use of the PII procedure as opposed to CMPs. It must also be borne in mind that both procedures aim to protect slightly different interests. The PII procedure seeks to achieve fairness between the parties where, after material has been excluded on the request of one party, even that party cannot rely on it. Therefore the adversarial component of common law justice remains intact as the parties remain on an equal footing. In a CMP, the focus is on securing justice at any cost. Hence, the propensity to mislead an otherwise impartial judge is a real possibility as the 'closed material' is untested and one-sided.[39] Material that has been kept away from the eyes of the accused and is only scrutinized by the judge is, in the adversarial nature of our court proceedings, uncontested by the other side and therefore, remains untested in the scheme of an adversarial court process.

Under the JSA 2013, once a section 6(1) declaration has been initiated,[40] section 8(1) requires the court 'to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security.'[41] Hence, once the 'CMP trigger' has been pulled, the court cannot conduct a balancing exercise of interests and is required to permit the withholding of any material that may compromise national security from the non-government party. The court cannot disclose

38. Human Rights Joint Committee, Report on the Justice and Security Green paper, HL paper 286, 32, [97].

39. Liberty's Committee stage briefing on Part 2 of the Justice and Security Bill in the House of Commons; January 2013.

40. Section 6(1) of the Act permits the court to make a declaration that the 'proceedings are proceedings in which a closed material application may be made to the court.'

41. Justice and Security Act 2013, s 8(1)(c).

the information even if it feels it would be in the interest of open justice. Serious implications flow from these aspects of the Act as they amount to creating a fetter on the courts discretion in a situation where the court may want to disclose the sensitive material irrespective of the damage such disclosure would cause to national security.[42] An amendment to provide this very discretion to the judge was accepted by the House of Lords during the report stage.[43] This amendment would have ensured that the judge would determine whether a claim for PII could be made out in the first place, and only after this determine whether a fair determination could be made by other means. This would have increased the court's flexibility and allowed for a balancing of interests.

IV. A DENIAL OF NATURAL JUSTICE?

Lord Dyson, giving the leading judgment in *Al Rawi*, spelled out the principles of natural justice, namely that a party must know all details of the case levelled against him and that he be given the opportunity to respond to the allegations and evidence led against him. He also added that the parties must be given access to the courts judgment along with reasons for it.[44] JUSTICE, in its report, similarly concluded that CMPs do not allow for significant features of a fair trial such as the right to an adversarial hearing and the equality of arms principle.[45] The equality of arms principle affords an opportunity to all parties to have knowledge of and challenge the evidence brought against them in court, with a view to influencing the

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42. For example, a situation where the court feels that although disclosure would cause harm to national security, disclosure of the material would result in greater preservation of justice.

43. Amendment 35, House of Lords Report Stage, November 2012.

44. *Al Rawi* (n 13) [12-13].

45. Justice, *Secret Evidence* (London: Justice, 2009), [416-418].

court's judgment.[46] The opposing view on this proposition (in support of CMPs or the pragmatists) is that as long as the judge has access to all the evidence, he is bound to be in a better position to achieve a fair result. However, Lord Kerr responded to the above proposition by pointing to a 'central fallacy of the argument'; '[e]vidence which has been insulated from challenge may positively mislead.'[47] CMPs can be undemocratic in so far as they deny the public the right to scrutinize judicial decision-making. They can be used to cover up serious, albeit infrequent, wrong doings of intelligence agencies and lead to a drop in professional standards if evidence goes by unchallenged.

The government justifies a departure from open and natural justice,[48] by pointing to certain statutory exceptions such as protecting the interests of a child,[49] justice[50] and national security.[51] The irony contained in justifying a departure from natural and open justice, by citing the 'interests of justice' in Rule 39.2(3)(g), is not to be missed. The government alludes to the exception in Article 6 ECHR, which also permits an exception to public hearings for national security concerns.[52] The case of *Carnduff v Rock*[53] is the exception the government alluded to, where the claim of a police informer for money was held to be unjustifiable by the Court stating that in order to achieve a fair hearing, the court would have to disclose confidential material for which the public interest in withholding the information was

46. *Lobo Machado v Portugal* [1996] ECHR 15764/89, [31].

47. *Al Rawi* (n 13), [93](Lord Kerr).

48. Justice and Security Green Paper, October 2011, [1.9, 5].

49. CPR Rule 39.2(3)(d).

50. CPR Rule 39.2(3)(g).

51. CPR Rule 39.2(3)(b).

52. *Kennedy v UK* (2011) 52 EHRR 4, [188].

53. *Carnduff v Rock* [2001] EWCA Civ 680.

greater than having the claim litigated openly.[54] The argument for CMPs is that such cases would be litigated fairly if the court, without comprising confidential material, could use the material and reach a just conclusion. It has been admitted that if a CMP were introduced, it might not have been necessary to strike out such a claim,[55] but bearing in mind that such cases are a rarity, it was considered a disproportionate response to introduce a 'fundamental change' in civil litigation to allow CMPs.[56] David Anderson QC, in an answer to a question, said that he was not aware of any other cases that were akin to *Carnduff v Rock*.[57]

It does seem that in a *Carnduff*-like case, a CMP would provide more flexibility and fairness as the government cannot always withdraw from litigating such cases from fear of disclosure of sensitive material as that would set a bad precedent of the government paying out unmeritorious claims. Lord Hope referred to this situation in *Tariq* and remarked that it 'would lead to the Government being seen as an easy target for unjustified claims.'[58] The *Carnduff* situation remains a dilemma, which must be resolved by reviewing the practical situation on the ground and determining the frequency of such cases occurring.

Post *Al Rawi*, CMPs cannot be invoked in judicial reviews,[59] leading to certain immigration cases allowing an unwanted individual to enter the

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54. ibid.

55. *Al Rawi v The Security Service* [2011] UKSC 34, [116].

56. ibid [50].

57. Joint Committee on Human Rights, Legislative Scrutiny: Justice and Security Bill, Oral Evidence HC370–i–iii 2012.

58. *Home Office v Tariq* [2011] UKSC 35, 79 (Lord Hope).

59. *Al Rawi v The Security Service* [2011] UKSC 34, [170]. Lord Clarke held that there was no principled basis for distinguishing between ordinary (tort) civil claims and claims for judicial review as 'both may involve identical questions of law and fact.' Therefore, he found that CMPs should not be allowed in either type of

UK as the intelligence agencies would rather allow that than disclose the intelligence. A case concerning important principles of privacy and access to secret evidence was the 'extraordinary rendition' of *Binyam Mohamed*.[60] This case involved the 'control principle,' whereby intelligence received from another country is not released without the permission of the country from where the information originated, thereby allowing for a reliable and trustworthy relationship between nations.[61] The basis for the existence of the control principle is that only the country from whom the information originated can fully understand the sensitivities at play in procuring the information and therefore they alone must remain in full control of its handling and dissemination.[62] The intelligence agencies were concerned about the so-called *Norwich Pharmacal* principle,[63] under which an application can be made for information from those who are not parties to a case but have been mixed up in wrongdoing, albeit innocently. The *Norwich Pharmacal* principle arose from a case of the same name where an owner of a patent of a chemical was aggrieved as the chemical was being imported into the UK without his permission. The aggrieved party (victim) applied for information pertaining to the identity of the importer (wrongdoer) from the Customs authorities (third party), but his request was declined. He then approached the Court where the House of Lords held that where a third party had become involved in unlawful conduct, they were under a duty to assist the person suffering damage by giving them full information and disclosing the identity of the wrongdoers.

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case. This was however not followed by the Legislature as section 6 of the JSA 2013 now permits CMP in both ordinary civil claims as well judicial review cases.

60. *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 248 and (No 2) [2009] EWHC 152.

61. It is a principle of conduct, not of law.

62. HM Government, Justice and Security Green Paper, October 2011: Cm 8194.

63. *Norwich Pharmacal Co & Others v Customs and Excise Commissioners* [1974] AC 133.

Mr Mohamed initiated a judicial review claim in the UK invoking the *Norwich Pharmacal* jurisdiction of the English Courts to enable his US lawyer to rely on the information in the US proceedings.[64] Under a *Norwich Pharmacal* order (NPO), a third party may be legally obliged to provide the victim with the information, pertaining to the wrongdoer, in its possession. This is the disclosure the Divisional Court (upheld by the Court of Appeal) permitted, where the third party were the UK intelligence agencies and the victim was Mr Mohamed who required the material for his defence in front of the US court proceedings against the US intelligence agencies.

An argument in support of CMPs is that if the court orders disclosure of information under a PII application, the intelligence agencies would have to risk compromising the information or withdrawing the claim completely, whereas in a CMP they would be able to safeguard the secrecy of the information while maintaining fairness of trial.[65] Thus, even after a court has approved a NPO in favour of disclosure, the government resisting the disclosure order can make a PII application. However, if the Court rejects the PII application, then the government must disclose the information. A direct corollary of the above is that if the government loses the PII application in court, no ejector seat exists for the government to pull out at that stage. Therefore, in the post-PII stage, the government does not have a final safety net for the purposes of protecting evidence it deems too secret to disclose. The government will have to consider, at the pre-PII stage itself, the real possibility of losing a PII claim and the following open disclosure

64. The judicial review claim was heard in a CMP by the Divisional Court, which ordered disclosure of the said information, subject to any PII claim the Secretary of State (SoS) might want to initiate. The information was subsequently released by an order of the US Court hearing a Habeas Corpus claim (brought by a number of Guantanamo detainees at the US District Court for the District of Columbia).

65. HM Government, Justice and Security Green Paper, October 2011: Cm 8194.

of information, an important deciding factor in whether the risk of losing a PII application is worth it.

In the aftermath of the *Binyam Mohamed* case, where a UK court ordered the release of sensitive information procured from US intelligence agencies, the UK has been warned by other countries to safeguard the information they receive from the international community or else the information inflow would dry up. The *Norwich Pharmacal* principle is another example or aspect of privacy invasion[66] which ushered in the pragmatism v principle debate, as the principle provides the court with discretion to legally bind a third party to release information pertaining to a particular case, as was done in *Binyam Mohamed*. However, in case of an NPO, the privacy of the innocent third party is invaded to meet the ends of justice. Nonetheless, section 17 of the JSA 2013 protects intelligence agencies from the courts power to order disclosure of 'sensitive information.'[67]

The next section deals with an important functional aspect of CMPs, the government appointed special advocates. Special advocates are provided to defend the non-government party in the closed proceedings. These advocates suffer from an inherent conflict of interest by reason of them being appointed by the government itself, often to oppose the government's request for CMP.

V. THE SPECIAL ADVOCATES PROCEDURE

Under closed proceedings, the government will divide its evidence into 'open'

66. In the case of an NPO, the privacy of the intelligence is compromised as they are forced to release information even when they have not perpetrated the unlawful conduct. On the other hand, the information in their possession is a potential game changer for the (allegedly innocent) victim.

67. Justice and Security Act 2013, s 17.

and 'closed' bundles, where the latter will not be provided directly to the other party but to a security-cleared special advocate assigned to represent the said party, appointed by the Attorney General. The concept of special advocates in the UK has Canadian origins,[68] but was first implemented in the UK post the Human Rights Court case of *Chahal v United Kingdom*,[69] where the court subtly advised the UK to follow such a procedure. In response, the UK enacted SIAC and the first statutory reference of special advocates was made in section 6 of the SIAC. Most practicing special advocates unanimously agree that the procedure has various practical problems, such as not having the power to rebut or adduce evidence presented in closed proceedings or mount challenges against objections to disclosure raised by the government.[70] The fact that they are government-appointed is itself an existing contradiction which could lead to bias and undermine their efforts in ensuring a fair trial. Lord Hewart CJ (as he then was) famously remarked, albeit in a judgment not concerning CMPs, that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[71] The Joint Committee on Human Rights (JCHR) said that it was 'entirely fanciful' to think that special advocates can cross examine expert evidence, and stressed that they have 'no means of gainsaying the governments assessment that disclosure would cause harm to public interest.[72] Lastly, the stifling restrictions imposed on communications between special advocates and the parties they represent do not ensure a substantial measure of procedural

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68. It has been argued that the European Court misinterpreted the Canadian procedure in the first place and secondly, it wrongly asked the UK to adopt its own misunderstood version of the Canadian procedure. For a general discussion, see D Jenkins, There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology, Columbia Human Rights Law Review, 2011.

69. *Chahal v United Kingdom* (1996) ECHR 413.

70. M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 CJQ 314.

71. *The King v Sussex Justices* [1924] 1 KB 256.

72. Joint Committee on Human Rights, 9th Report of 2009–10, HL 64, HC 395, 21, 59.

justice.[73] Lord Bingham remarked that special advocates would merely be 'taking blind shots at a hidden target.'[74] Nevertheless, the main premise behind the use of special advocates, such as to effectively mitigate the prejudice resulting from non-disclosure of evidence, has received support from eminent jurists, such as Lord Carlile[75] and Lord Hoffmann.[76] In the *MB* case,[77] Lord Hoffmann found the special advocates procedures to be adequate and believed that they would always satisfy the demands of fairness. He felt that the Strasbourg Court had ruled on the point in *Chahal v United Kingdom*,[78] where the Court found the procedure in the Canadian courts satisfied the requirements of article 6 of the ECHR.[79] According to him, this was the same procedure that was adopted in Britain.[80] Therefore, Lord Hoffmann felt that the special advocate's procedure was an apt mechanism to mitigate between the practical requirements of national security protection, as well the right to a fair trial enshrined in article 6. However, Lord Hoffmann fell into the minority on this point as the majority did not find that procedural justice is *always* served by the special advocate's procedure.[81]

In view of the above, it does seem that the lack of administration of justice in the existing procedures governing special advocates outweighs the benefits afforded in terms of protection of national security interests by controlling the

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73. ibid [90].

74. *Roberts v Parole Board* [2005] UKHL 45 [18].

75. Lord Carlile, Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, March 2010.

76. *MB v Security of State for the Home Department* [2007] UKHL 46, [54] (Lord Hoffmann).

77. ibid.

78. *Chahal v United Kingdom* (1996) ECHR 413.

79. Although later the Grand Chamber of European Court held that the British procedure of special advocates, arising out of Chahal, was incompatible with article 6 of the Convention. *A and Others v United Kingdom*, 49 Eur HR Rep 29 (2009).

80. MB (n 78).

81. ibid [74] (Baroness Hale).

limited disclosure of sensitive evidence. The lack of communication between the special advocate and the accused makes it practically impossible for the accused to be given effective and meaningful protection.[82] The fact that the special advocate cannot discuss the secret evidence with the accused means that the special advocate will never know if the accused had an alibi or innocent explanation for certain circumstances.[83] Lastly, a special advocate only owes a duty towards the court and not towards his client. This is an enormous departure from the traditional fiduciary relationship shared between a client and his lawyer and it is unfair to the client to be represented by someone who does not owe him such a duty.

Taking cognizance of the inherent lack of justice and fairness in this procedure, the government has introduced a Special Advocate Support office, comprising of independently acting lawyers, in addition to the CAC's[84] recommendation for training. There are instances where the contribution of special advocates has been determinative within the existing procedures, albeit in most instances the 'exculpatory' material produced by them does not lead to a change in the government's assessment of the material. The CAC, now known as the Justice Committee, concluded in its 2005 report that the use of special advocates should only be resorted to in exceptional circumstances.[85] Observing the rise in the number of cases using CMPs,[86] it

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82. Special Advocates' Memorandum on the Justice and Security Bill submitted to the Joint Committee on Human Rights, 14 June 2012, [19.1].

83. M Chamberlain, 'A barrister who's worked in secret courts since 2003 describes a twisted system of justice worthy of Kafka' *MailOnline* (England 13 March 2012) <http://www.dailymail.co.uk/debate/article-2114162/Closed-material-procedure-Barrister-describes-twisted-justice-worthy-Franz-Kafka.html#ixzz3LO2lQte2> .

84. House of Commons Constitutional Affairs Committee, *7th Report*, 2004-2005, 3 April 2005.

85. ibid [55].

86. Ministry of Justice, *Written Ministerial Statement* (22 July 2014) <http://www.parliament.uk/documents/commons-vote-office/July-2014/22July2014/27-JUSTICE-ClosedMaterialProcedure.pdf>, Lawrence McNamara and Daniella Lock, 'Closed Material Procedures Under The Justice and Security Act 2013' (2013) Bingham Centre <http://www.biicl.org/documents/284_CMPs_the_first_year_-_bingham_centre_paper_2014-03.pdf>.

is safe to assume that the recommendations of the CAC have not been heeded seriously enough.

Martin Chamberlain, a well-known and experienced special advocate, has voiced his concern regarding there being no balance between national security and fairness in the current regime.[87] We can safely assume that this line of thought stretches across the special advocates' community since 57 of the 69 special advocates,[88] who responded to the Justice and Security Green Paper, termed the use of CMPs as 'inherently unfair.'[89]

The general discontent with the existing special advocates' procedure, especially from those who actually perform the role itself, seems to be premised on the entrenched principle of a right to a fair trial, or lack thereof in the case of the existing procedure, which is a cardinal rule in both EU law as well as UK human rights jurisprudence. It appears that an overwhelming number of special advocates agree with the fact that even though the rational extension of CMPs is understandable, further extension in civil litigation is not.[90] From a practical viewpoint, the special advocates' body feels that CMPs are rightly restricted to national security grounds[91] and more importantly the government should act responsibly and not ask for an expansive interpretation of national security. The pragmatism v principle

87. K Walker, 'With 'no balance' between national security and fairness, serious doubts remain over 'secret justice' plans' MailOnline (England 27 June 2012) <http://www.dailymail.co.uk/debate/article-2165393/Why-doubts-remain-Secret-Justice-plans.html#ixzz3LO4rwSdb> accessed 17 January 2014.

88. Most of the Special Advocates questioned were those with considerable experience. Typically, only those barristers are appointed as special advocates who have sufficient legal experience.

89. Justice and Security Green Paper: Response to Consultation from Special Advocates, 16 December 2011, [15].

90. Special Advocates' Memorandum on the Justice and Security Bill submitted to the Joint Committee on Human Rights, 14 June 2012 (Special Advocates' Memorandum).

91. Justice and Security Act 2013, s 6.

debate again assumes a significant undertone in the special advocates' procedure, where the special advocates were unequivocal in their stance that CMPs are inherently unfair and against the common law tradition.[92]

VI. COMPATIBILITY OF CMPs WITH ECHR AND EU LAW

The *Tariq*[93] case involved an interesting departure from a line of UK and Strasbourg court cases, in that the court rejected as necessary the basic requirement of providing the outline of the case to the accused. *Tariq* was an immigration officer who challenged, as discriminatory, the removal of his security clearance following a terrorism investigation. He challenged the statutory CMP applied in the employment tribunal and asked for at least the 'A-Standard' of disclosure[94] in relation to his discrimination claim. The Supreme Court upheld the CMP without providing the A-standard of disclosure and also found compliance with his rights under Article 6 ECHR.[95] This aspect of the judgment rekindles the debate regarding the compatibility of CMPs with ECHR and EU principles. The Grand Chamber in *A v United Kingdom*[96] reaffirmed this principle stating that Article 5(4) ECHR requires that the detainee be 'provided with sufficient information... to enable him to give effective instructions to the special advocate.[97] Subsequently, the House of Lords in the sequel to the MB decision, *AF*[98] subscribed to the

92. Special Advocates' Memorandum (n 92).

93. *Tariq* (n 58).

94. The A-standard disclosure principle is the 'core, irreducible minimum of procedural protection,' which means that at least the 'gist' of the case against the party must be disclosed to him. see *MB v Security of State for the Home Department* [2007] UKHL 46, [43] (Lord Bingham).

95. M Fordham QC, 'Secrecy, Security and Fair Trials: The UK Constitution in Transition' (2012) 17 Judicial Review 3, 18.

96. *A v United Kingdom* [2009] 49 EHRR 65.

97. ibid [220].

98. *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28.

European Court's decision in applying the same A-Standard to Article 6 (the right to a fair trial) and the standard of being given 'sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.'[99] This is now referred to commonly as the *AF* Principle. It has been applied to cases of deprivation of liberty[100] and control orders. [101] The JCHR felt that it should be applied to all proceedings in which CMPs are employed,[102] but in *Tariq*, the immigration officer was not entitled to this protection because: i) in certain security and surveillance cases, an individual is not entitled to such information where such rights would obstruct the security and vetting procedure itself[103] and ii) Mr Tariq sought employment, of his own volition, to a post that required a security clearance.[104] In the *Tariq* case, the Supreme Court held that the requirements of article 6 were met due to the aforementioned two reasons and therefore the case was not seen as an aberration outside the scope of article 6.[105]

In *Tariq*, the bench held that *AF* principle was inapplicable to proceedings before the Employment Tribunal.[106] Lord Hope differentiated the *AF* case in so far as no fundamental right was being breached in *Tariq*, nor was he faced with criminal proceedings – it was merely a civil claim for damages.[107] We must note that in *Tariq*, CMP had specific statutory authorisation,[108]

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99. ibid [59] (Lord Philips).

100. *A v UK* (n 98).

101. *Secretary of State for the Home Department* (n 100).

102. Joint Committee on Human Rights, HL session 2009-10 paper 86, [14, 106].

103. *Tariq* (n 58) [148], [158].

104. ibid [75], [159].

105. The European Court had already held in the *Chahal* case that article 6 of the ECHR is compatible with the use of a CMP.

106. *Tariq* (n 58) [69].

107. ibid (Lord Hope).

108. Employment Tribunals Act 1996, s 10.

while in *Al Rawi*,[109] the Supreme Court denied it under common law (in the absence of an existing statutory provision). This exact requirement is what the government was trying to fulfill by passing the Justice and Security Bill.[110]

The government argues against the use of the *AF* principle and, prior to *Tariq*, the courts always rejected the plea, subject to one exception found in deportation proceedings before SIAC (where Article 6 is inapplicable).[111] The obvious reason for the government's stance against disclosure of even the outside of the case to the accused is to protect the intelligence it has received along with its sources. Nevertheless, this Supreme Court decision can influence future litigation in a manner such that, where issues of liberty and 'ordinary' control orders are present, the *AF* principle will apply and in other cases, such as *Tariq*, they will not.[112]

In civil claims, Her Majesty's Government (HM) is mostly the defendant and hence cannot withdraw from the case (unlike in criminal cases) to avert disclosing the closed material. This is the basic hurdle the government wants to overcome by providing for CMPs in ordinary civil claims.

The JSA 2013 only focuses on civil litigation and not on criminal trials. After various amendments by the House of Lords and the Commons during the Bill stages, the eventual Act fortunately restricts the application of CMPs in civil court cases to those concerning national security interests. Further,

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109. *Al Rawi* (n 13) [41] (Lord Dyson delivering the majority judgment).

110. Justice and Security Green Paper (The Stationer office, 2011) Cm 8194.

111. *RB (Algeria) v Secretary of State for Home Department* [2009] UKHL 10.

112. The AF principle will be inapplicable under the TPIM regime as they impose a 'less onerous' nature of obligations.

it does not extend to inquests[113] and is strictly confined to litigation. Thus the Act does not extend to police cases, such as *Carnduff v Rock*[114] which concerns sensitive material other than in the national security context. However, a significant omission is the absence of the Wiley balance from section 8 of the Act. Section 6 is the triggering section while section 8 sets out detailed rules regarding the courts discretion in permitting a CMP.[115] Section 8(1)(c) should have included the 'Wiley balance' as a check on the erosion of the right to a fair trial, rather than providing a blanket rule of non-disclosure, where the material impinges on national security without any other consideration. This means, according to section 8(1)(c), that as long as the court feels that certain information is going to harm national security to any extent (even minimally), it can only order for withholding disclosure of such material and more crucially, that it has not been conferred the power to exercise its discretion in carrying out a balancing of rights exercise as in the Wiley balance.

Therefore, although the ECHR compatibility principle has been given central significance in terms of interpretation, it does not extend to all cases such as *Tariq* and other cases beyond its reach.[116] The A-standard has been incorporated into statutory CMP regimes in cases like *AF*. But ultimately, the ECHR principle is a starting point, with article 6 not being a universal requirement in every case.[117] The ECHR has adopted a balanced approach in the pragmatism v principle debate, by holding the procedures of closed evidence and special advocates as compatible with article 6.[118] However,

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113. As suggested in the Justice and Security Green Paper, October 2011.

114. ibid 37.

115. A Tomkins (n 33) 305.

116. Such as deportation cases.

117. *Tariq* (n 58).

118. *A v UK* (n 98).

the Court in *A v United Kingdom* said that adequate information must be given to the parties in order to enable them to give effective instructions for their defense.[119] The ECtHR has managed to adopt a balanced approach notwithstanding the deficiencies inherent in the systems and procedures governing the conduct of secret evidence. Undoubtedly, the ECtHR, being the final and more importantly, binding, arbiter of compatibility of UK legislation with the rights provided under the ECHR, does afford a certain level of conclusiveness to any issue in conflict before it. Any procedure that may infringe rights guaranteed under the Convention is subject to the touchstone of dicta emerging from the ECtHR.

VII. PASSAGE OF THE JUSTICE AND SECURITY BILL

The main objective the government was trying to achieve through this Bill was to heighten judicial scrutiny of intelligence services providing sensitive information to the courts, which would otherwise be excluded altogether under a successful PII application.[120]

The Government's Green Paper[121] had proposed to extend CMPs beyond national security cases[122] as well as leaving the trigger in the hands of the executive alone, whose decision would only be subject to judicial review.[123]

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119. ibid [220].

120. In a departure from the objective of enabling courts of law to rely on material that was altogether removed in a PII application, the government proposed to introduce CMPs to ordinary civil litigation claims, sparking outrage amongst civil liberty groups, the legal fraternity etc.

121. Justice and Security Green Paper, October 2011: Cm 8194.

122. The Government wanted to extend CMPs to civil or tort claims to deal with cases where it relies on intelligence inputs and those cannot be revealed to the public. For example, in claims by Guantanamo Bay detainees, the government would want to lay a lot more of the blame at their American counterparts doorstep but this would cause problems in international relationships if it were to come out in the open.

123. Justice and Security Green paper, October 2011: Cm 8194, 22, [2.7].

This attracted wide criticism from a group of all substantially experienced Special Advocates who termed it as 'fundamentally unfair' and saw no reason for an extension to any civil claim.[124] David Anderson QC conceded to using CMPs only when all other established means such as PII and confidentiality rings had been exhausted.[125] The JCHR report[126] on the Green Paper condemned this proposal and felt that no 'real and practical problem' existed to justify the said extension. In view of this antagonistic response, the government published a *Response Document*[127] as well as the *Justice and Security Bill*.[128] It reaffirmed its position in *Al Rawi* where a court should determine the requirement of a CMP and 'restrict' their use to national security grounds. Since 'national security' is not defined, it leaves open the possibility for broad interpretation of the same. Other aspects such as clause 6 restricted the discretionary power of the judge by forcing him to declare all material against national security as 'closed' irrespective of whether it can be withheld under PII rules. The direct consequence of this clause was the subversion of judicial discretion in restricting the court from carrying out a balancing act (of competing public and national security interests) in arriving at a conclusion of disclosure or non-disclosure. However, the most important objection was against the exclusive power of the government to apply for a CMP, especially without any clause requiring the excluded party to be given the outline or summary of the case against him.

[124.] See, for example, Response to Consultation from Special Advocates (16 December, 2011). This was a response to a public consultation process initiated by HM's Government. <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

[125.] The Justice and Security HC Bill 2012 (370-i) < http://www.parliament.uk/documents/joint-committees/human-rights/Uncorrected_Transcript_Justice_and_Security_Bill_David_Anderson_19062012.pdf>.

[126.] Joint Committee On Human Rights Legislative Scrutiny: Justice and Security Bill, Ninth report; HL Paper 157/ HC 107, 15 April 2013. See 25 [72].

[127.] HM Government Response to the Joint Committee on Human Rights, *Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill* (Cm 8533)

[128.] HM Government, Justice and Security Bill, May 2012.

Even Article 6[129] cases will then have to be 'read down.'[130] The reasoning in the Green Paper for this 'recalibration' is threefold: a) to allow security agencies to rely on information, which would otherwise be caught in the PII vacuum; b) to allow security agencies to argue a case on its merits instead of having to settle; c) to prevent disclosure of sensitive material not caught by the PII process.[131] These very points form the crux of the pragmatic side of the debate around CMPs. The urgent need to protect national security interests in times of rising terrorism and espionage is what prompted the Government to introduce these changes. Nevertheless, in order to give due weight to the different voices of society, the Justice and Security Act 2013 has taken into account the principled objections or deficiencies voiced by the opposition.

One of the arguments forwarded by the government in support of CMPs is that a PII exercise would be much more time-consuming than a CMP,[132] which has been rebuffed by a Angus McCullough, a seasoned special advocate, who believes that a CMP would not take any less time and even if it were to, it will undermine the cornerstone of the justice system- open and natural justice.[133] The crucial aspect of judicial balancing of public interests, absent from CMPs, promotes fairness and allows a balancing of rights, different from the unprecedented step of allowing '...one party to a civil claim to decide unilaterally that a procedure which favours his own case should be adopted for the trial of the claim.'[134] From an open justice point of view, the

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129. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 6.

130. *MB* (n 78); Prevention of Terrorism Act 2005 was 'read down' [44].

131. See generally, Justice and Security Green paper, October 2011: Cm 8194.

132. *Al Rawi* (n 13) [54].

133. Joint Committee on Human rights, Justice and Security Green Paper Cm 8194, [81, 98].

134. Joint Committee of Human Rights, Twenty Fourth report of Session 2010-12, HL Paper 286, 4 April 2012. Dinah Rose QC opinion, [100].

PII procedure seems a lot more just than a CMP.

VIII. JUSTICE AND SECURITY ACT 2013

It was estimated that between 1997 and 2009, Parliament had legislated 14 times to permit the use of secret or closed evidence in civil and administrative proceedings.[135] For example, the Terrorism Prevention and Investigation Measures Act 2011 (TPIM 2011), Schedule 4,[136] or the Counter-Terrorism Act 2008, Part 6;[137] however no specific statutory provision applicable to civil cases was present.

The Justice and Security Act, 2013 received Royal Assent on 25 April 2013. The Bill had undergone extensive debate before enactment and therefore vociferous critics such as Amnesty International continued to hold their positions on the opposite side of the government. Tim Hancock, Amnesty International's UK campaign director, termed it as 'a terrible day for British justice.'[138] Other human rights charities such as Reprieve said that 'secret courts will not make us any safer.'[139]

Section 6(1) of the Act permits the use of CMPs in civil actions and section 6(11) allows for their use in all courts up to the Supreme Court. This was particularly important as it cleared the confusion and the alleged overreach of the Supreme Court in the *Bank Mellatt* case.[140] In *Bank Mellat*, the Supreme

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135. Justice (n 45) [79].

136. Terrorism Prevention and Investigation Measures Act 2011, Sch 4.

137. Counter-Terrorism Act 2008, Part 6.

138. N Watt, 'Last-ditch bid to dilute secret courts plan fails,' *The Guardian* (27 March 2013) <http://www.theguardian.com/law/2013/mar/27/secret-courts-plan-fails> accessed 17 January 2014.

139. ibid.

140. *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38.

Court held that, even in the absence of an express statutory warrant, it did indeed have the power to order a CMP. This was exactly what the court had refused in *Al Rawi* and curiously enough, the Supreme Court (in a majority) in *Bank Mellat* held that it was not departing from its earlier dictum in *Al Rawi*. The reasoning behind this conclusion is interesting. In *Al Rawi*, Lord Dyson, giving the lead judgment, acknowledged the absence of an express term permitting the use of CMP in civil actions for damages and went on to say: 'In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far.'[141] Therefore, in the absence of a clear statutory provision, the Court decided that it could not read-in such a procedure.

In *Bank Mellat*, the Treasury had passed an order[142] that, in effect, suspended or shut down the operation of Bank Mellat (Iranian) and its subsidiary in the UK. This order was made under section 62, Schedule 7 of the Counter-Terrorism Act 2008[143] that, inter alia, allowed the Treasury to shut down any operation that '... poses a significant risk to the national interests of the United Kingdom.'[144] *Bank Mellat* challenged this decision via a statutory procedure of judicial review provided in section 63 of the 2008 Act. At first instance, Mitting J found in favour of the Treasury in that the use of a CMP (provided for in Part 6) with respect to certain information was appropriately demanded. The Court of Appeal dealt with the matter in a similar, albeit small, closed session.

Then the appeal found way to the Supreme Court, whose justification for

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141. *Al Rawi* (n 13) [47] (Lord Dyson).

142. Financial Restriction (Iran) Order 2000.

143. Counter-Terrorism Act 2008, Sch 7.

144. The Counter-Terrorism Act 2008 [United Kingdom of Great Britain and Northern Ireland], Chapter 28, 26 November 2008 <http://www.refworld.org/docid/496718af2.html> accessed 17 January 2014.

the vires of its decision was found in the extensive jurisdiction of the Court as provided for by section 40(2) and 40(5) of the Constitutional Reforms Act 2005.[145] Section 40(2) says that an appeal lies to the [Supreme] Court 'from any order or judgment of the Court of Appeal'.[146] Section 40(5) says that the [Supreme] Court has the power to decide any question 'necessary to be determined for the *purposes of doing justice in an appeal* to it under any enactment'.[147] Therefore, Lord Neuberger reasoned that these sections provide the Court with a very wide inherent jurisdiction and thus to deal with an appeal of a closed or partially closed judgment would require the use of a closed material procedure by the Supreme Court as well.[148] It would be an odd situation if the proceedings in a case at the Court of Appeal stage were conducted in closed proceedings and which would not be followed when the case is admitted to the Supreme Court by way of a statutory appeal. This presents a very compelling argument in favour of the use of the Court's wide jurisdiction, for how could the Supreme Court provide justice in an appeal where a closed material procedure was used in either the Court of Appeal and at first instance, without itself perusing the material in closed proceedings? The alternatives of allowing the suspect full view of the material at the Supreme Court stage or ignoring it entirely are also not particularly inviting.

However, Lord Kerr in his dissent was not persuaded by these '*pragmatic* considerations' and bluntly stated (referring to Schedule 4 of the Terrorism and Prevention Investigation Measures Act 2011) that Parliament had not intended to include the Supreme Court in the list of courts having the power

145. Constitutional Reform Act 2005 (Commencement No 6) Order 2006.

146. ibid s 40(2).

147. ibid.

148. *Bank Mellat* (n 143) [37] (Lord Neuberger).

to apply for CMPs.[149] He also said that at the time of writing section 40(5) it was not contemplated for it to be used in this manner.

While referring to *Al Rawi* he reiterated that this [Supreme] Court had clearly stated that any '... attempt to graft on to a statutory provision a purpose which Parliament plainly never had in order to achieve what is considered to be a satisfactory *pragmatic* outcome is as objectionable as expanding the concept of inherent power beyond its proper limits (emphasis added).'[150] Parliament was unmindful of *Al Rawi* and therefore only refers to the High Court, Court of Session and Court of Appeal in the Terrorism and Prevention Investigation Measures Bill ('TPIM'). Presumably, the Court will refer to section 40(2) and 40(5) to do 'justice' in TPIM cases. The minority placed much reliance on the oft-quoted canonical principles laid out by Lord Hoffmann in *ex parte Simms*,[151] that 'in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'[152]

One last reflection prompted by *Bank Mellat* is based not on anything said by the learned judges during the course of their judgments but in the dictum of Laws LJ in *R v The Lord Chancellor, ex parte Witham*,[153] where he postulated that common law constitutional rights could only be removed

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149. ibid [124]-[125] (Lord Kerr).

150. ibid. In my respectful submission, the court in *Bank Mellat* had no option but to expand the purport of sections 40(2) and 40(5) to include the Supreme Court, the highest court of the land, as a court capable of hearing a CMP. It would be a rather anomalous situation if it did not have the inherent power to do so. I believe that in this case, the court has surely reacted pragmatically to preserve the principles of justice and to keep the parties on an equal footing.

151. *R v Home Secretary, ex parte Simms* [2000] 2 AC 1.

152. ibid 131.

153. *R v The Lord Chancellor, (ex parte Witham)* [1998] QB 575.

by express words in legislation.[154] Although he was referring to the right of access to courts, the cardinal right to open and natural justice would be encapsulated within this as well.[155]

Undeniably, the *Bank Mellat* case has clearly demonstrated the preference of the highest court of the land to view the debate from a pragmatic point of view. The reconciliation of the two interests, protection of national security and protection of fundamental rights, will always face an acute clash. However, from this case it is clear that the pragmatists are on the ascendancy; if the court was inclined towards a stricter approach based on principle, their Lordships would never have expanded (as mentioned earlier) the purport of sections 40(2) and 40(5) to include the Supreme Court within the ambit of the legislation. In this instance the Court was willing to import an intention of Parliament in reading a piece of legislation for the purposes of maintaining parity in the hierarchical court structure in the UK as well as preserving the interests of the parties.

An important criticism of the Bill has been clarified through an amendment made by the House of Lords during the passage of the Bill, whereby section 6(1) and 6(4) now enable either parties to the litigation to initiate a CMP and the court can accept the application of the non-government party or even launch a CMP on its own motion. This has done away with some measure of arbitrariness which some believe was the underlying theme of the Act. The courts have also been given the power under section 7 to revoke section 6 declarations if it is in the interest of 'fair and effective

154. ibid 586 [G] (Laws LJ).

155. C Forsyth, 'Principle or Pragmatism: Closed Material Procedure in the Supreme Court' UK Const L Blog (29 July 2013) <http://ukconstitutionallaw.org> accessed 17 January 2014.

administration of justice.'[156] Thus, the power to terminate a CMP also has the same criterion of fair and effective justice. A review or monitoring provision has also been introduced through section 12, which requires the Secretary of State to report on the number of cases that used a CMP and on whose application. Section 13 requires the Secretary to appoint a person to review the provisions governing CMPs after every 5 years. These measures provide a certain amount of transparency and fairness to the regime and also marginally diminish the image of the government being a bully in cases of protecting their intelligence agencies at the expense of a citizen and his fundamental rights. Importantly, the implementation of sections 12 and 13 will act as a deterrent in the use of CMPs, hopefully restricting their use by the government.[157] Whether these checks and balances are enough to preserve the values of justice enshrined in our common law can only be determined by the frequency of the use of CMPs in coming years. The government will have to exercise caution in applying for CMPs in the first place, but more importantly, the presence of sections like 7, 12, and 13 must act as a deterrent in a substantive sense. For them to act as effective safeguards, they must be implemented seriously and in an independent manner.

IX. CONCLUSION

In summary, there are a few points that can be made regarding the existing law on CMPs. First, it must be conceded that the safeguards included in the Act are quite a step-up from those in the Bill. The government accepted recommendations of maintaining judicial discretion, equality between parties

156. The Justice and Security Act 2013, s 7(2).

157. T Hickman 'Turning out the lights? The Justice and Security Act 2013' UK Const L Blog (11 June 2013) <http://ukconstitutionallaw.org> accessed 17 January 2014.

in making an application for a CMP and the review mechanism.[158] The Government took into account the views of different human rights groups and special advocates for the purposes of upholding of fundamental rights. For the purposes of equality and fairness, the government incorporated the suggestion that either party can ask for a CMP. This was a step taken to placate the opposition groups in the direction of preservation of justice as opposed to state highhandedness. Second, the government was able to hold its redlined position on the non-application of the 'Wiley balance.' Third, even if the government has to go through a PII process, it can always press the eject button by conceding the entire claim if asked to disclose the sensitive information. This was not possible in the *Binyam Mohamed* case because that involved a third party disclosure according to the Norwich Pharmacal rules. In any case, now the Act includes section 17 that immunises intelligence agencies from the Norwich Pharmacal principle. However, in *R (Omar) & Ors v Foreign Secretary*,[159] the Court of Appeal overruled the *Binyam Mohamed* case by holding that the court should not have allowed the application of the above principle. Fourth, the key issue introduced in the Act (as distinct from the Bill) is that the 'fair and effective' criterion is to be used both in permitting an application for CMPs [section 6(5)] and in its termination [section 7(2)].[160]

The government argues that it is faced with a catch-22 in fighting cases where it must hold back key arguments or not litigate a case in the absence of a CMP. In an age of increasing national security threats and terrorism, the government's position to think of the larger interests of its people cannot be termed as unreasonable. Yet the aforementioned fundamental principles

158. ibid.

159. *R (Omar) & Ors v Foreign Secretary* [2013] EWCA Civ 118.

160. T Hickman (n 160).

being compromised through the existing CMP regime does not tilt the 'balance' in their favour either. It is important to remember that judges have been given the discretion to decide whether material is harmful to national security interests or not. They are only restricted once they make that declaration, meaning they are not restricted from using the 'Wiley balance' in making that first conclusion in terming the material as sensitive material.[161] Our predicament lies in deciding the fate of our long treasured principles of open and natural justice; are we prepared for this conceivable Pandora's box which might result in turning the above principles of justice into a cloistered virtue?

[161.] Section 6(11) of the JSA 2013 defines 'sensitive material' as, 'material the disclosure of which would be damaging to the interests of national security.'

Problems in the Relationship Between the Termination or Suspension of a Treaty on the Ground of its Material Breach and Countermeasures

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I. INTRODUCTION

In the present state of international law, there is an ever-increasing number of treaties governing a great scope of international relations and playing a more significant role for dealing with the problems that humanity faces.[1] Therefore, although not all treaty breaches are intentional, nor are they of the same gravity,[2] the breach of a treaty acquires even more importance, as it becomes a more frequent phenomenon, at times with serious consequences.

The singularity of the legal regulation governing the breach of a treaty is that it is effected through the combination of provisions from two different bodies of rules of international law: the law of treaties, governed by the Vienna Convention on the Law of Treaties (VCLT),[3] and the law of State responsibility, governed by the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts.[4] Thus, the problem arises of the relationship between these two regulations.

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1. K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status' (1988) 35 NILR 273.

2. Bruno Simma and Christian Tams, 'Reacting Against Treaty Breaches' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 576-577.

3. Vienna Convention on the Law of Treaties (signed 23 May 1969), 1155 UNTS 331.

4. Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, (56) Supp No 10, 43 UN Doc A/56/10 (2001), *available* <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (Hereinafter referred to as the ILC Articles on State responsibility).

II. THE RELATIONSHIP BETWEEN RESPONSES TO TREATY BREACHES

1. The regulation in the VCLT and the International Law Commission (ILC) Articles on State Responsibility

It is noteworthy that the VCLT contains only one provision on the breach of treaties, that of Article 60 ('Termination or suspension of the operation of a treaty as a consequence of its breach') in Part V, which reads as follows:

> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State; or
>
> (ii) as between all the parties;
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
>
> 3. A material breach of a treaty, for the purposes of this article, consists in:
>
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
>
> 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
> 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisal against persons protected by such treaties.

The legal regime set out by the VCLT in Art 60 is supplemented by cumbersome procedural conditions stipulated in Arts 65-68 VCLT, and lays

down permissible reactions to the material breach of a treaty, providing for either the suspension or for the termination of the breached treaty.[5] These reactions depend on the material character of the breach, the bilateral or multilateral character of the treaty and on the parties affected by the breach. Moreover, Art 60 of the VCLT reserves special provisions in the relevant treaty applicable in the event of a breach and excludes from its scope provisions relating to the protection of the human person contained in treaties of a humanitarian character.[6]

The reason for the inclusion of this provision in the VCLT is obvious. Since the breach of a treaty affects treaty obligations, the VCLT, which is the body of rules that contains the general law on treaties, would be incomplete if it did not address the matter.[7] As Simma and Tams note with regard to the purpose of Art 60, 'drafters had to strike a balance between two conflicting interests: while, generally, they intended to promote the stability of treaty relations, they also had to accommodate the interest of States to free themselves, temporarily or permanently, from treaties that have lost their benefit due to a prior breach by a defaulting State.'[8]

Art 60 of the VCLT refers to a particular form of breach, the material breach of a treaty as defined in its paragraph 3, without defining the general notion of the breach. It is the law of State responsibility which defines the breach of an international obligation: indeed, in Art 12 of the ILC

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5. Thomas Giegerich, 'Article 60' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (Springer 2012) 1023; According to Brunno Simma and Christian Tams, 'Article 60 (1969)' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties, A Commentary* vol 2 (OUP 2011) 1377) it 'has been ground-breaking and has had an important influence on the future development of treaty law and the law of State responsibility generally.'

6. Giegerich (n 5) 1024.

7. Simma and Tams (n 2) 580.

8. Simma and Tams (n 5) 1353.

Articles on State responsibility it is stipulated that 'there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' It is notable that the law of State responsibility does not distinguish according to whether the origin of the breached international obligation is a treaty or custom.

According to the ILC Articles on State responsibility, when conduct consisting of an action or omission is attributable to a State under international law and constitutes a breach of an international obligation of the State, there is an internationally wrongful act of that State,[9] which entails its international responsibility.[10] This responsibility can take the form of cessation, non-repetition and reparation,[11] but it can also take the form of countermeasures, consisting in the temporary non-performance of international obligations of the State taking the countermeasures towards the responsible State, pursuant to Arts 49-54 of the Articles on State responsibility. Art 49 ('Object and limits of countermeasures') stipulates that:

> 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
> 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

The main characteristic of countermeasures, which differentiates them from

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9. Art 2 ILC Articles on State Responsibility.

10. Art 1 ILC Articles on State Responsibility.

11. According to Arts 28 to 33 of the ILC Articles on State Responsibility. Therefore it should be emphasised that the treaty law responses to the breach of a treaty do not preclude the general consequences of the breach of an international obligation according to the law of State responsibility, regardless of whether the breach is material or not.

the responses to breach contained in the law of treaties, is their flexibility,[12] namely the possibility of taking countermeasures against any treaty breach, material or non-material; the wide discretion of States in their response, which can consist in the non-performance of any international obligation of the State resorting to countermeasures, not only of obligations arising from the breached treaty,[13] limited by the condition of proportionality[14] and by exclusionary provisions protecting particularly important obligations;[15] and the less strict procedural conditions.[16] If however the conditions for the taking of countermeasures are not met, their wrongfulness is not precluded and the State taking them bears international responsibility.

Therefore, the relationship between the law of treaties and the law of State responsibility as far as the breach of treaties is concerned lies at the heart of the problem of whether international law deals adequately with the problem of the breach of treaties.

2. Main points of this relationship according to the preparatory works of the International Law Commission, the international law doctrine and international case law

12. Simma and Tams (n 2) 595.

13. Bruno Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law' (1970) 20 ÖZöR 5, 12; Linos-Alexander Sicilianos 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 EJIL 341, 354; Simma and Tams (n 5) 1354; Giegerich (n 5) 1045.

14. Art 51 ILC Articles on State Responsibility.

15. Art 50 ILC Articles on State Responsibility.

16. Art 52 of the ILC Articles on State Responsibility, according to para 1 of which before taking countermeasures, an injured State must call upon the responsible State to fulfil its obligations under part two, and notify the responsible State of any decision to take countermeasures and offer negotiations with that State. On the contrary, Arts 65 to 68 of the VCLT provide for the notification of any claims, the lapse of a three-month period during which another party can object, dispute settlement by a method chosen by the responding and objecting parties; lastly, if there is no agreement between them on a method of dispute settlement, there is resort to mandatory conciliation according to Annex 1 to VCLT.

The difficulties in the relationship between the law of treaties and the law of State responsibility were emphasized by Simma in his leading article, who observed that:

> Article 60 constitutes one of the provisions [of the Vienna Convention] with regard to which- aside from the procedural shortcomings-the limited scope of the Vienna Convention on the Law of Treaties will be felt most clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions to breach having their *sedes materiae* in the law of treaties, any examination of the breach situation limited to an analysis of the rules of the Vienna Convention will, due to the exclusion of the similar reactions having their *sedes materiae* in the law of international responsibility, provide the observer with an incomplete picture.[17]

In the past the view had been supported that the termination or suspension of a treaty on account of breach constituted a form of countermeasures, in other words countermeasures are the genus and termination or suspension are the species.[18] This view has been criticised in theory as blurring the necessary distinction between the law of treaties and the law of State responsibility.[19] It has been stressed that the term countermeasures must be used strictly for the measures laid down in the law of State responsibility[20] and that 'the transposition of institutions of the law of State responsibility to the law of treaties cannot be justified. Such reasoning ignores the doctrinal differences between measures having their source in the law of treaties and those having their source in the law of State responsibility [...].'[21]

In fact, the view of the overwhelming majority of the doctrine is that there is a distinction between the termination or suspension of a treaty and

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17. Simma (n 13) 83.

18. Georges Abi-Saab, 'General Course of Public International Law' 207 RDC (1987-VII), 15, 463; similarly Sicilianos (n 13) 359.

19. Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 147.

20. ibid 146.

21. ibid 145.

countermeasures.[22] Moreover, this is also the conclusion drawn from the works of the ILC. Waldock, the fourth Special Rapporteur of the ILC on the law of treaties, stated that the article on material breach of a treaty is 'not intended to exclude whatever other rights may accrue to the non-defaulting party by way of countermeasures.'[23] The relationship between Article 60 and countermeasures was also explained by Special Rapporteur Crawford in his third Report on State Responsibility as follows:

> It is clear that there is a legal difference between the suspension of a treaty (or a severable part of a treaty) and the refusal (whether or not justified) to comply with the treaty. The suspension of a treaty (or of a severable part of a treaty) if it is legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation. By contrast, conduct inconsistent with terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts. Countermeasures are no more ground for suspension of a treaty than necessity.[24]

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[22] See indicatively Simma (n 13) 56; Sicilianos (n 14) 341; Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff Publishers 1996) 44; Fitzmaurice and Elias (n 19) 131; Simma and Tams (n 5) 1354.

[23] Sir H Waldock, Second Report on the Law of Treaties, ILC Yearbook 1963, Vol. II, 76, [14].

[24] Third Report on the Law of Treaties by Mr J Crawford, Special Rapporteur, UN Doc A/CN 4/507/Add. 3 (1999), [324]; See also Simma (n 13) 55, who observes that 'replication to a breach in form of suspension according to article 72 deprives the actions or omissions of the treaty violator *ex nunc* of their illegal character because it discharges both parties from the obligation to continue the performance of the treaty concerned. Replication in form of retaliatory suspension, on the other hand, does not only not affect the illegality of the breach, but is on its part justified only as long as the treaty infringements by the other party have not ceased'; Willem Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations' in R St. J Macdonald and D M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff Publishers 1989) 581, 601, who however used the term 'countermeasures' in relation to the treaty law responses according to Art 60 VCLT; Simma and Tams (n 5) 1354, '[...] a countermeasure constitutes the (justified) violation of a binding norm; it has no effect on the continued existence of the norm as such. In contrast, reactions under Article 60 involve the temporary or permanent extinction of a norm; i.e. they- at least temporarily- remove the underlying legal bond between the parties to the dispute.'

Relevant to the problem of the relationship between Art 60 VCLT and countermeasures is the fundamental distinction between primary and secondary rules of international law.[25] This distinction was introduced by the Special Rapporteur on State Responsibility, Roberto Ago, and constituted the basis on which the rules on State responsibility were elaborated. According to it, primary are the rules imposing on States obligations whose breach can be a source of responsibility, while secondary rules are the rules aimed at determining the legal consequences of failure to fulfill obligations established by the primary rules.[26]

Along these lines the difference between the law of treaties and the law of State responsibility was explained by Special Rapporteur Crawford, as far as the breach of a treaty is concerned:

> There is a clear distinction between action taken within the framework of the law of treaties [..], and conduct raising questions of State responsibility [...]. The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply Vienna Convention rules as to materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to proportionality etc., in dealing with countermeasures.[27]

Moreover, it has been supported that the aim of the termination or suspension of a treaty is mainly corrective, in the sense that their main purpose is to restore the balance of rights and obligations between the State or States which have been affected by the breach and the defaulting State, while the aim of countermeasures is coercive, as their main purpose is to exercise

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[25] See also Fitzmaurice and Elias (n 19) 146.

[26] Report of the ILC, 32nd Session, ILC Yearbook 1980, vol II (2), 27 [23].

[27] Crawford (n 24) [325]. See also Fitzmaurice and Elias (n 19) 134.

pressure on the State responsible for the breach of the treaty to resume its performance.[28]

Another question which has been dealt with in the doctrine is whether the adoption of Art 60 VCLT modified or restricted the right not to perform treaty obligations by countermeasures. It has been argued that the regime of responses codified in Art 60 VCLT is either exclusive, thereby prohibiting resort to countermeasures in response to breaches of treaties, or that it at least modified their regime, precluding resort to countermeasures in case of immaterial breaches.[29] In support of this view, reference has been made to Art 42 paragraph 2 VCLT that prescribes the exclusivity of the suspension and termination mechanisms provided for in the Convention or the relevant treaty itself.[30] However, better arguments speak against the exclusivity of Art 60,[31] based on Art 42 paragraph 2 combined with Art 73 VCLT, according to which 'the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from [...] the international responsibility of a State [...].'; namely that, on the one hand, according to Art 42 paragraph 2, the VCLT deals with the conditions for the termination or suspension of a treaty as a result of its material breach, and that, on the other hand, according to Art 73, it does not preclude countermeasures in case of breach of a treaty, material or non-material. Most importantly, the

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28. Simma (n 13) 20-21; Sicilianos (n 13) 344-345; Simma and Tams (n 5) 1354. Nonetheless, it has been noted that the suspension of a treaty is also aimed at inducing the defaulting party to cease the violation of the treaty and act in conformity with it, as otherwise it is not only released from its obligations but also deprived of its rights arising from the treaty (Simma (n 13) 39-40, who refers to them as measures of suspension of *mixed character*; Giegerich (n 5) 1041).

29. Derek William Bowett, 'Treaties and State Responsibility' in Daniel Bardonnet, Jean Combacau, Pierre-Marie Dupuyand Prosper Weil (eds) *Mélanges Virally* (Pedone 1991) 139; D W Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1993-1994) 34 VJIL 295, 356-60 and 369-82.

30. Bowett (n 29) 139.

31. Simma and Tams (n 5) 1376.

parallel existence of countermeasures and reactions based on Art 60 VCLT is recognized by international courts and tribunals when called upon to determine the consequences of treaty violations.[32]

3. Problems in the relationship

In spite of the legal analyses in the doctrine and the *travaux préparatoires* of the ILC, there still remains confusion on the relationship between the law of treaties and the law of State responsibility as far as the breach of a treaty is concerned. This confusion is illustrated in the pleadings of States before both the International Court of Justice (ICJ) and international arbitral tribunals,[33] in which there is usually no clear distinction between the termination or suspension of a treaty and countermeasures.

The problem is created by the fact that the conditions of application of countermeasures are less strict than those of Art 60, as there is no need to prove the existence of a material breach and to comply with the cumbersome procedural conditions of Arts 65-68 VCLT. Consequently, the party affected by the breach, even if the latter is a material one, will prefer not to invoke it in order to release itself more easily from its obligations under the breached treaty through countermeasures. In this way, however, Art 60 loses much of its importance. This problem becomes even worse given the fact that when a party to a treaty resorts to the non-performance of that treaty as a reaction to its previous breach by another party, it usually does not

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[32] See n 40.

[33] See especially the *Case concerning the Air Services Agreement of 27 March 1946 (United States v France)* (1978) 54 ILR 338; *Rainbow Warrior Arbitration (New Zealand v. France)* (1990) 82 ILR 499; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (1972) ICJ Rep 46; *ICJ Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 3; clearer is the distinction in the recent *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* [2011] ICJ Rep 644.

make clear whether it does on the basis of Art 60 VCLT or on the basis of countermeasures. Therefore, it is difficult to examine whether it complies with the conditions of application of each means of reaction.

The case law of international courts and tribunals, in spite of some useful clarifications on the relationship between the termination or suspension of a treaty as a result of its material breach and countermeasures, has not adequately dealt with the difference in the conditions of application of the two kinds of responses to the breach of a treaty.

More specifically, in the *Air Services Agreement* case, the arbitral tribunal, after having reaffirmed the legitimacy of countermeasures, went on to state that it was not important 'to introduce various doctrinal distinctions and adopt a diversified terminology dependent on various criteria, in particular whether it is the obligation allegedly breached which is the subject of the countermeasures or whether the latter involves another obligation, and whether or not all the obligations under consideration pertain to the same convention.'[34] Therefore, it did not examine the arguments of the US and France which were based on Art 60 VCLT.

The arbitral tribunal in the *Rainbow Warrior* case stated that, apart from the Agreements at issue, both the VCLT, as codification of the customary law of treaties, and the customary laws of State responsibility were relevant and applicable. However, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness and the appropriate remedies for breach, were subjects that belonged to the customary law of State responsibility.[35] In this way, nevertheless, as it has

34. Air Services Award (n 33) [82].

35. *Rainbow Warrior Award* (n 33) [75].

been stated in theory, 'if a state wishing to avoid its obligations under a treaty can justify breaching the treaty by reference to the full range of excuses known to the law of state responsibility, why should it pay any heed to the stricter grounds and procedures applicable under the law of treaties?'[36]

The most important clarification on the relationship between the law of treaties and the law of State responsibility was made by the ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*. The Court stated, inter alia, that these two branches of international law have a distinct scope: 'a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.'[37]

Lastly, an important issue which also needs to be examined is the status in international law of *exceptio non adimpleti contractus* principle, in other words, the exception of non-performance. According to this principle, the performance of an obligation by a party may be withheld if the other party has itself failed to perform the same or a related obligation.[38] This principle has its roots in the notion of reciprocity and is accepted in many national, especially civil, legal systems.[39] There remains uncertainty, however as to the status of the principle in international law. In particular, although the exception of non-performance has been recognised to some extent in

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[36] Susan Marks, 'Treaties, State Responsibility and Remedies' (1990) 49(3) CLJ 387, 388.

[37] Gabčíkovo-Nagymaros Judgment (n 33) [47].

[38] James Crawford and Simon Olleson, 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility' (2000) 21 AYBIL 55, 56.

[39] ibid 66-73.

international judicial and arbitral decisions,[40] it has not been included either in the VCLT as a ground for the suspension of treaty obligations, or in the ILC Articles as a circumstance precluding wrongfulness of the non-performance of an international obligation.[41] Therefore, even if it is accepted as an international law principle, questions arise as to whether the *exceptio non adimpleti contractus* principle belongs to the law of treaties, as it has been supported in the doctrine,[42] or to the law of State responsibility; which its conditions of application are, applied especially in regards to whether it can only be applied with regard to strictly synallagmatic obligations and whether it is subject to procedural requirements. Moreover, if the exception is a principle of international law, its exact relationship with countermeasures or the suspension of a treaty needs to be examined.

In the *FYROM v Greece* case, Greece invoked in its defence the principle of *exceptio non adimpleti contractus*, partial suspension under Art 60 VCLT and countermeasures. The ICJ considered that Greece had failed to establish the conditions necessary for the application of any of its defences and that for that reason it was unnecessary for it to determine whether the doctrine of the *exceptio non adimpleti contractus* formed part of contemporary international law, or any of the additional arguments advanced by the parties with respect to the law governing countermeasures or Art 60 VCLT.[43] However, there was reference to the *exceptio non adimpleti contractus* in the separate opinions of the judges in the case, who expressed opposing views on

40. See for example the *Case Concerning the Diversion of Water from the Meuse (The Netherlands v Belgium)* [1937] PCIJ Rep Series A/B No 70, Dissenting Opinion of Judge Anzilotti (50) and Individual Opinion of Judge Hudson (77-8).

41. Crawford and Olleson (n 38) 56.

42. Greig (n 29) 400.

43. Application of the Interim Accord (n 40) [161]-[164].

the issue.[44] Thus, the issue of the *exceptio non adimpleti contractus* remains unsettled.

Consequently, it might be supported that although international jurisprudence has offered some important insights into the relationship between the law of treaties and the law of State responsibility, particularly into the relationship between the termination or suspension of a treaty and its non-performance as countermeasure, it has not clarified important aspects of this relationship. As a result, there is persisting confusion on the matter.

III. CONCLUSION

It is obvious that the relationship between the termination or suspension of a treaty as a result of its material breach and countermeasures is far from settled. Although these two responses against treaty breaches may seem similar as they both result in the non-performance of obligations of the party affected by the breach towards the defaulting party, there are indeed differences between them as countermeasures do not affect the legal force of the treaty. At the same time, the conditions of application of termination or suspension of a treaty are much stricter than those of countermeasures, with the result that the non-defaulting party will usually resort to them in order to react to the breach of a treaty. Consequently, it might be supported that this relationship requires further examination in order to ensure legal certainty with regard to responses against treaty breaches. In any event, the purpose must be to strike a balance between the stability of treaties and effective responses to their breach.

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[44] Application of the Interim Accord (n 33) Dissenting Opinion of Judge ad hoc Roucounas [66] and Declaration of Judge Bennouna (p 1); contra Judge Simma in his Separate Opinion, especially [21].

Legal Analysis of the Guanxi System's Influence over Competition in the Chinese Domestic Market

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I. INTRODUCTION

'It's not personal, it's business'. This well-known saying reflects the traditional Western understanding of how a business should be managed.[1] However, this attitude is not globally shared and East Asian cultures especially tend to emphasise the personal aspects of doing business. In fact, *guanxi* (connections), in Confucian societies, is believed to be the key to financial success.[2] Although this phenomenon is not unique to Asia, as it can, to some extent, be found, in the US of the 1950s,[3] China remains by far its most emblematic illustration considering; as observed by Buttery and Leung, 'nothing much happens in China other than through the *guanxi* network, and certainly little is sustainable without it.'[4] This has a significant influence on a firm's choice of business strategy, which also affects a multinational enterprise's ability to compete in the Chinese domestic market.

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1. Phil Gerbyshak, 'It's Not Personal, It's Business' (*philGERBYSHAK*, 16 April 2009) <http://www.philgerbyshak.com/its-not-personal-its-business/> accessed 18 October 2011; 'It's Not Personal, It's Business' (*Business Opportunities*, 17 April 2009) <http://www.business-opportunities.biz/2009/04/17/its-not-personal-its-business/> accessed 18 October 2011.

2. Jan Selmer, Carolyn Erdener, Rosalie L. Tung, Vernon Worm and Denis F. Simon, 'Managerial Adaptation on a Transitional Economy: China' in Malcolm Warner (ed), *China's Managerial Revolution*, (Frank Cass 1999) 37.

3. Mei-hui Yang Mayfair, 'The Resilience of *Guanxi* and its New Deployments: A Critique of Some New *Guanxi* Scholarship' [2002] CQ 459, 470.

4. Roger Bennett, '*Guanxi* and Sale-force Management Practices China' in Malcolm Warner (ed), *China's Managerial Revolution*, (Frank Cass 1999) 74.

Therefore, considering the numerous multinational enterprises operating in the Chinese market, an understanding of how the *guanxi* system affects competition and the possible legal solutions to this problem, is of the utmost importance. While the influence of *keiretsu* (Japanese Corporate groupings), the Japanese equivalent to *guanxi*, and the US's ability to use antitrust laws to regulate them, have been the subjects of much academic debate, there has so far been limited discussion regarding China's *guanxi* system and competition. This paper will attempt to bridge this gap in the literature, by comparing the Japanese and Chinese systems and applying the legal theory written about the *keiretsu* to *guanxi*. This comparison of Japan and China is utilising 'traditional' methodology, as many scholars have looked to Japan for guidance in explaining and interpreting the Chinese economic development model.[5] Since most of the academic writers who addressed the issue of *keiretsu* are American, this paper will concentrate on American corporations as the Western representative, instead of referring to international enterprises in general.

This paper argues, that the *guanxi* system manipulates competition in the Chinese domestic market, and while some of its effects can be defined as illegal under Chinese domestic law, the existence of various loopholes around the law decrease a firm's ability to rely on it, leading firms to seek extraterritorial enforcement. First, we will analyse the main characteristics of the *guanxi* system in the light of the *keiretsu* model, which highlight various common features. These similarities will be further discussed in the second section of the paper, with particular regard paid to their respective influence over competition. Finally, we shall deal with the various legal aspects of this problem: application of Chinese laws, the limitation of those

[5] Douglas N Ross, 'Communitarian Capitalism: A 'Market' Model for China?' in Malcolm Warner (ed), *China's Managerial Revolution*, (Frank Cass 1999) 12.

laws, and the possibility for extraterritorial jurisdiction.

II. STRUCTURE AND CHARACTERISTICS: COMPARING THE JAPANESE *KEIRETSU* AND THE CHINESE *GUANXI*

The development of East Asian economies gave rise to new corporate structures, which are fundamentally different from their Western counterparts. While the *guanxi* networks in China and *keiretsu* groups, one of the most distinct features of the Japanese economy, can hardly be defined as identical, their shared cultural values have nevertheless led to the development of similar features. This chapter will present the main features of both systems by comparing the *guanxi* networks and the *keiretsu* groups. However, it is important to note that not all of the system's features will be examined, but only those having an effect on the market.

a. Structure

The *keiretsu* is a traditional 'amorphous corporate grouping', which evolved as an answer to the Anti Monopoly Act 1947.[6] Similarly to the Japanese *keiretsu*, the *guanxi* is also a loosely structured network. Chinese companies are often characterised as smaller in size due to their focus on network strategy, meaning that 'profits are not reinvested in existing firms but into new firms linked to the parent firm'', creating business groups (*qiye jituan*) that 'embody sizeable investments even though the size of any one member firm is small.'[7]

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[6] Peter T Muchlinski, *Multinational Enterprises and the Law*, (2nd edn, Oxford University Press 2007) 63; AMA: Antimonopoly Act 1947.

[7] David L Wank, 'Institutional Process of Market Clientelism: Guanxi and Private Business in a South China City' (1996) 147 CQ 820, 837.

b. Trust & Reputation

Economic sociology explains that trust 'can institutionally undergird market activities', since it provides assurance for stability and future exchanges.[8] Both the *keiretsu*[9] and *guanxi* systems attribute a great importance to the elements of trust and reputation.[10] In Japan, reliance on trust, as corporate governance mechanism, significantly decreases fear of opportunism as well as minimising transaction costs.[11] Japanese suppliers, thus, are far more likely to choose to cooperate with Japanese manufacturers, who in their eyes are more trustworthy.[12]

In China, the fear of opportunism is minimised, due to 'the pecuniary threat of network ostracism associated with opportunistic behaviour.'[13] Since ignoring a *guanxi* based commitment will result in loss of reputation,[14] firms, by relying on *guanxi*, guarantee the performance of a commitment.[15] As trust is usually connected to a specific individual/firm, it is not easily transferable, which 'enhances the likelihood of future cooperation.'[16]

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8. Yadong Lou, *Guanxi and Business* (World Scientific 2000b) 46-7.

9. James R Lincoln, Michael L. Gerlach and Peggy Takahashi, '*Keiretsu* Networks in the Japanese Economy: A Dyad Analysis of Inter-corporate' (1992) 57(5) ASR 561, 566.

10. Based on research data from WorldWork Ltd. 2010 as presented in 'Member's briefing: Can British and Chinese Companies Cooperate?' China-Britain Business Council/ 英中贸易协会 October 20th 2010, 17:00-19:00); Jeffrey H. Dyer, 'Does Governance Matter? *Keiretsu* Alliances and Asset Specificity as Sources of Japanese Competitive Advantage'[1996] 7(6)

11. Minimization of information and transaction costs happen due to 'increasing behavioral transparency and reducing information asymmetry' Lincoln (n 9) 662.

12. Lincoln (n 9) 649, 662-4.

13. Stephen S Standifird and R. Scott Marshall, 'The Transaction Cost Advantage of *Guanxi*-based Business Practices' in JT Li (ed), *Managing International Business Ventures in China*, (Pergamon 2001) 353.

14. Bennett (n 4) 75; Standifird (n 13) 343.

15. John Dixon and David Newman, *Entering the Chinese Market: The Risks and Discounted Rewards*, (Quorum Books (1998) 27.

16. Lou (n 8) 47; Tonny Fang, *Chinese Business Negotiating Style*, (SAGE Publication, 1999) 120.

c. Personal Relations: Individuals & Organization

There is a common saying in the business world 'it is not about what you know, but who you know...'[17] The *keiretsu* system is the result of complex interweaving relationships, both at the individual level and at the level of the corporation.[18] This element of personal-relations helps to foster trust,[19] which in turn ensures that the *keiretsu* system endures changing circumstances. In China, personal affiliations are currently often subordinate to official laws and regulations.[20] Since *guanxi* emphasises the concept of human feeling (*renqing*),[21] often used as instruments to facilitate economic exchanges,[22] establishing *guanxi* usually expands on the existence of a common social base.[23]

d. Long term Strategy

> 'The stamina of the horse is tested by distance, the heart of a person is tested by time.'[24]

The *keiretsu* groups tend to prefer long-term commitment to encourage mutual obligation[25] and stability, which in turn enables them to adopt long-

17. Standifird (n 13) 343.

18. Ely Razin, 'Are the *Keiretsu* Anticompetitive - Look to the Law' (1993) 18(2) NAJILCR 351, 358.

19. Dyer (n 10) 661-4.

20. Bennett (n 4) 75. One example is the Contract Law, as in China guanxi are often used as an alternative mechanism for contractual enforcement. Donald C. Clarke 'Economic Development and the Rights Hypothesis: The China Problem', (2003) 51 AJCL 91-2.

21. Mayfair (n 3) 465.

22. Douglas Gurthie, 'Declining Significance of *Guanxi* in China's Economic Transition' (1998) 154 CQ 254, 257.

23. Lou (n 8) 4-6; Fang (n 16) 119; Wank (n 7) 829-31.

24. '路遥知马力，日久见人心' (Chinese proverb) Fang (n 16) 110.

25. Lincoln (n 9) 566.

term strategies[26] and decreases the uncertainty most companies face. This tendency to rely on long-term strategies leads them to forgo the short-term strategies of cost minimisation for the development of sustainable cooperations.[27]

Chinese firms, much like their Japanese counterparts, are long-term oriented.[28] *Guanxi* cultivation is a long process, which requires both time and patience.[29] Even after *guanxi* is established, maintenance still remains a crucial key for success, since a failure to preserve relations may have a 'devastating effect'.[30] Firms are constantly seeking to strengthen their relations with the bureaucracy by avoiding immediate compensation and explicit reciprocity, thus securing their own interests.[31]

e. Mutual Obligation and the Concept of Reciprocity

> 'The norm of reciprocity has long been recognized as an organizing principle in exchange networks.'[32]

One of the key sources for the *keiretsu* group's cohesion is the traditional value of reciprocal obligation.[33] In China, *guanxi* is seen as social capital defined as obligations, social position and trust which generates economic value.[34] Reciprocity is a concept well known to everyone,[35] since it is the

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26. Toby Myerson, 'Barriers to Trade in Japan: The *Keiretsu* System--Problems and Prospects' (1992) 24(3) NYULILP 1107, 1107.

27. Razin (n 18) 363.

28. Gurthie (n 22) 23.

29. Dixon (n 15) 28.

30. Standifird (n 13) 359.

31. Standifird (n 13) 828-34.

32. Lincoln (n 9) 566.

33. ibid.

34. Lou (n 8) 41-2.

35. Ross (n 5) 23.

cornerstone of every *guanxi* network based on the concept 'that all favours will eventually be repaid'.[36] A failure to live up to the expectations and obligations[37] created by *guanxi* can lead to 'loss of face'.[38]

f. Governmental Involvement

In Japan, the *keiretsu* acts as an 'institutional bridge between government and business',[39] a role which supports its dominant economic position in the market. In China, the government's role in controlling and directing the economy is even stronger.[40] Nowadays, although SOEs (State-Owned Enterprises) no longer dominate the economy, they remain a key player, especially in certain 'strategic sectors', where the state 'exercises very significant, or even increased, control.'[41] As the importance of *guanxi* in the sector is closely correlated with the level of governmental involvement, success in both SOEs dominated sectors and their supplementary industries heavily depend on the firm's *guanxi.*[42] Hence, 'government protection', due to its control over licensing, resources and funds, can erect significant barriers for foreign competitors, where and when it wishes to do so.[43]

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36. Bennett (n 4) 75.

37. Dixon (n 15) 28; Ross (n 5) 20.

38. Bennett (n 4) 74; Julius C. Ronny, *Navigating through Chaos in China* (Mentogonost limited, 2006) 62.

39. Ross (n 5) 14

40. Bruce M Owen, Su Sun and Wentong Zhang, 'China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond' 75 (2008-2009) Antitrust L.J. 231, 238-9; Dixon (n 15) 54.

41. Owen (n 40) 240-3.

42. Mayfair (n 3) 463-5.

43. Yadong Lou, *Partnering with Chinese Firms* (Ashgate Publishing Company 2000a) 302.

III. THE INFLUENCE OF THE *GUANXI* AND *KEIRETSU* SYSTEMS ON COMPETITION

> 'If one has good connections, ones problems will be solved.'[44]

In order to determine whether the *keiretsu* and *guanxi* systems can be defined as anticompetitive practices, two elements must be proven. The first is that the structure of the corporate relationships 'negatively affects competition'.[45] The second is causation, the cause for the 'reduced market access must be established',[46] as antitrust law can only apply in cases where the corporate relationships 'constitute actionable anticompetitive behaviour'.[47] It is commonly acknowledged that *keiretsu* has a significant influence over competition in the Japanese domestic market;[48] this influence originates from the unique features shared by both the *keiretsu* and the *guanxi* system. Hence, by connecting the adverse effect of the *keiretsu* (first element) to its structural causation (second element), this section will demonstrate how these shared features, as presented in the previous section, led to the creation of similar adverse effects within the Chinese domestic market.

While in Japan the penetration of foreign manufacturers into the market is still considerably low, despite American companies' best efforts to break

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[44] Dixon (n 15) 32.

[45] Razin (n 18) 357.

[46] ibid 379.

[47] Some scholars argue that the keiretsu anticompetitive effect is not due to actionable anticompetitive behavior, but due to the keiretsu greater efficiency. Razin (n 18) 357 However, since the SOEs are known to be inefficient, especially in comparison to the foreign Enterprises, it is a highly unlikely that the same can be attributed to guanxi. Yong Huang, Shan Jiang, Diana Moss and Randy Stutz, 'China's 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry' 31 [2010] ELJ 337, 362.

[48] Joel Davidow, 'Keiretsu and U.S. Antitrust' (1993) 24(4) LPIB 1035, 1039.

through the *keiretsu*'s 'monopoly';[49] in China the percentage of market penetration by foreign firms is significantly higher.[50] This may lead us to question the validity of the *keiretsu-guanxi* comparison, as one can argue that *guanxi* lacks the *keiretsu*'s effectiveness in blocking foreign competitors. Nevertheless, this argument should not be overstated, as the higher rate of foreign investment in China can be attributed to various reasons other than gaunxi's lack of effectiveness.

The first possible explanation is the difference of market size; as China is currently considered to be the second largest economy in the world,[51] it stands to reason that the amount of FDI in China shall be higher. Hence, the gap between China's and Japan's FDI may be mitigated by examination of the percentage of investment out of GDP.[52] The second explanation suggests that *guanxi*'s effectiveness, much like the *keiretsu*'s,[53] is sector-dependent, as certain sectors[54] are more susceptible to *guanxi*-based competition

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[49] Kiyoshi Mori, 'Industrial Sea Change: How Changes in Keiretsu Are Opening the Japanese Market' (1994) 12(4) BR 20, 20; Eleanor M. Fox, 'Toward World Antitrust and Market Access', (1997) 91(1) AJIL 1.

[50] China's 2013 GDP is about 90% higher than Japan's GDP for the same year. 'GDP Ranking' (The World Bank, 24 September 2014) <http://data.worldbank.org/data-catalog/GDP-ranking-table> accessed 7 November 2014; 'Foreign Direct Investment Japan' (*ieconomics*) <http://ieconomics.com/foreign-direct-investment-china-japan> accessed 9 November 2014.

[51] China GDP is 2nd only to the USA, making it the 2nd largest economy in the world. 'GDP Ranking' (*The World Bank*, 24 September 2014) <http://data.worldbank.org/data-catalog/GDP-ranking-table> accessed 7 November 2014.

[52] China: 1.27%, Japan: 0.02%. <http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS.> accessed 7 November 2014; <http://www.tradingeconomics.com/japan/foreign-direct-investment> accessed 8 November 2014; <http://www.tradingeconomics.com/china/foreign-direct-investment> accessed 8 November 2014.

[53] While American companies are prevented from entering the Japanese customized software market due to the dominant presence of *keiretsu*. Rieko Mashima, 'Examination of the Interrelationship among Japanese I.P. Protection for Software, the Software Industry, and *Keiretsu*, Part I', 82(1) [2000a] JPTOS 33. The *keiretsu*'s neglect of the prepackage software enabled the penetration of American companies to the Japanese domestic market. Rieko Mashima, 'Examination of the Interrelationship among Japanese I.P. Protection for Software, the Software Industry, and *Keiretsu*, Part II ', 82(3) [2000b] JPTOS 203-216.

[54] Mainly in sectors defined as 'strategic' such as: automobiles, steel, technology, telecommunication,

manipulation;[55] thus, assuring that the percentage of FDI in those strategic sectors is significantly lower.[56] Therefore, a comparison between *keiretsu* and the *guanxi* system is valid, as long as we account for variations in market size and sectors' classifications.

a. Limiting of Market 'Openness' by Relying on Long-Term Links

International corporations, in particular American ones, often attribute their failure to establish and expand in the Japanese markets to the dominance of *keiretsu*[57] and their competition strategies. *Keiretsu* allegedly rely on personal relations of a long-term nature,[58] in order to create 'unofficial but pervasive barriers of entrance'[59] which limit the market 'openness' to foreign investors.

Foreign firms, looking to invest in China, may face similar obstacles, as *guanxi* are the basic building blocks for securing a long-term agreement with suppliers, access to limited resources, winning government contracts and obtaining special permits and funds.[60] In China, especially in the strategic and

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transportation, utilities etc. and their supplementary industries. Owen (n 40) 243-4; Kenneth J Hamner, 'The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China' (2001-2002) 11(2) J Transnat'l L. & Pol'y 401-2.

55. Ross (n 5) 4-5.

56. Less than 15% of the total China's 2012 FDI, <http://www.stats.gov.cn/tjsj/ndsj/2013/indexeh.htm> accessed November 9 2014.

57. Fox (n 49) 1.

58. Barbara J. Spencer and Larry D. Qiu, '*Keiretsu* and Relationship-Specific Investment: A Barrier to Trade?' (2001) 42(4) IER 871, 882; Razin (n 18) 9.363, 374.

59. James R Lincoln, Michael L. Gerlach and Christina L. Ahmadjian, '*Keiretsu* Networks and Corporate Performance' (1996) 61(1) ASR 67, 86.

60. Standifird (n 13) 342,351; The founder of Shanghai Qianrui Garment Company explained: 'It's almost impossible for small, private businesses to get a loan in China, unless you have [connections]' Mina Hanbury-Tenison, 'Web offers a comfortable fit' Financial Times (Nov 23, 2010) <http://www.ftchinese.com/story/001036011/en> accessed 8 November 2014; Seung Ho Park, Shaomin Li, David K. Tse, 'Market Liberalization and Firm Performance during China's Economic Transition', 37(1) [2006] JIBS 130; Yadong

supplementary sectors dominated by SOEs,[61] domestic firms hold the upper hand. This is mainly due to the fact that the duration of the relationship is crucial in determining the strength and durability of the connections;[62] hence, while domestic companies may utilise their pre-existing networks to improve their position within the market and limit or prevent the entrance of new competitors,[63] foreign firms must build these networks 'from scratch'.

Furthermore, firms' internationalisation strategies include business analyses which examines various elements such as: risk, regulation, access to information, cost of establishment, market potential and so on; the combined value of all of these elements assists the firms in deciding on location and mode of entrance[64] (assuming that they are rational players). In China the nature of the *guanxi* system facilitates commercial transactions while strengthening market opacity, the limiting access to information,[65] as well as requiring a long-term commitment. Thus creating, similarly to Japan, a rather strong and effective barrier of entrance and decreasing market 'openness' as a result. From past experience it appears that in order to succeed in the Chinese market, foreign corporations must be willing and able to suffer loses for a relatively long period of time, which most small to

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Luo, 'Industrial Dynamics and Managerial Networking in an Emerging Market: The Case of China', 24(13) [2003] SMJ 1317, 1325-6; Hanbury-Tenison (n 60); Lou (n 8) 48.

61. Owen (n 40) 243-4.

62. Lou (n 8) 54.

63. Chenting Su, Zhilin Yang, Guijun Zhuang, Nan Zhou and Wenyu Dou, 'Interpersonal influence as an alternative channel communication behavior in emerging markets: The case of China', 40(4) [2009] JIBS 673; Lianxi Zhou, Wei-ping Wu and Xueming Luo, 'Internationalization and the Performance of Born-Global SMEs: The Mediating Role of Social Networks', 38(4) [2007] JIBS 678.

64. Oliver Burgel and Gordon C. Murray, 'The international market entry choices of start-up companies in high-technology industries', 8(2) [2000] JIM 35-7; Ryuhei Wakasugi, 'The Effects of Chinese Regional Conditions on the Location Choice of Japanese Affiliates', *Keio University* 56(4) [2005] 2 <http://www.readcube.com/articles/10.1111/j.1468-5876.2005.00337.x> accessed 7 November 2014.

65. Standifird (n 13) 351; Dixon (n 15) 32.

medium companies cannot withstand.[66] Illustrating examples are the cases of L'Oreal KFC and McDonnell Douglas. L'Oreal had to wait nine years before it became profitable in China while KFC spent ten years perfecting its business model before it became the powerhouse it is today.[67] Nevertheless, these companies have managed to achieve success. The story of McDonnell Douglas, in contrast, did not have such a 'happy ending', as McDonnell Douglas had to leave China in embarrassment after more than two decades.[68]

b. 'Market Foreclosure Effect' and 'Vertical Boycott'

'Market foreclosure effect' is a phenomenon, where 'a potential or actual participant in a market is prevented from participating in the market [...] [due to] competitive practices'.[69] This phenomenon has been associated with *keiretsu* dominated industries, as *keiretsu*, by relying on 'reciprocal and exclusive dealings, [...] erects insurmountable barriers to participants in sectors in which the *keiretsu* are active,'[70] as well as diminishes the potential for international trade.[71]

An additional phenomenon that may result from reciprocal and exclusive dealings is a 'vertical boycott',[72] which is an agreement between a seller and

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66. Burgel (n 64) 36.

67. *The Economist*, 'A disorderly heaven: Most foreigners underestimate the eccentric nature of China's business environment - A survey of business in China' (Mar 18, 2004) <http://www.economist.com/node/2495184> accessed 9 January 2011.

68. ibid.

69. Razin (n 18) 372; Michael A. Salinger, 'Vertical Mergers and Market Foreclosure' (1988) 103(2) QJE 353.

70. Razin (n 18) 373.

71. The automotive industry, for example, is known to be dominated by the *keiretsu*, using their structural advantages to gain 'a competitive advantage over their U.S. counterparts'; Dyer (n 10) 649.

72. Davidow (n 48) 1043.

a group of customers not to sell to someone outside that group.[73] The reciprocal nature of *keiretsu* exempts corporations from reliance on either 'official agreement'[74] or actual vertical mergers, since their intra-*keiretsu* networks provide them with an efficient and exclusive supply system,[75] thus making both suppliers and retailers (even without officially agreeing to do so) reluctant to either purchase from or sell to 'new companies trying to establish themselves in Japan.'[76] For example, three dominant Japanese glass manufacturers allegedly 'collaborated to tie up all available distributors', hence denying potential competitors access to the Japanese domestic market.[77]

In China, the reciprocal nature of the *guanxi* system, as mentioned in the previous section, makes reciprocal and tie-in dealings fundamental business tools. Companies do not focus on obtaining a single sale, but rather on establishing a network of frequent buyers.[78] This system is effective due to the social norms that lie behind them, since a potential buyer may 'lose face' if they do 'not buy from someone with whom [they have] a *guanxi* relationship.'[79] In fact Chinese businesses will ignore the classical 'commercial rationality',[80] purchasing lower quality product for higher price, in order to maintain *guanxi*.[81] Furthermore, as resource allocation is determined and

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73. Richard M Steuerof and Mayer Brown LLP, 'Executive Summary Of The Antitrust Laws' (March, 2008) <http://library.findlaw.com/1999/Jan/1/241454.html> accessed 8 November 2014.

74. Fox (49) 19-22.

75. Spencer (n 58) 893.

76. Davidow (n 48) 1043.

77. Fox (n 49) 19.

78. Lou (n 8) 138-41.

79. Bennett (n 4) 76-8; Katherine R. Xin and Jone L. Pearce, '*Guanxi*: Connections as Substitutes for Formal Institutional Support', (1996) 39(6) AMJ 1641.

80. Bennett (n 4) 77; *The Economist* (n 67).

81. Bennett (n 4) 79; Selmer (n 2) 33.

manipulated by *guanxi*,[82] firms with solid connections in the sector can not only gain access to limited resources but also prevent their competitors from doing so.[83] Thus, as multinational enterprises are naturally less 'connected' than their local counterparts, they might struggle to obtain access to the necessary suppliers and distributer (vertical boycott),[84] resulting in their inability to operate within the market (market foreclosure effect).

c. Market Allocation

> 'Market allocation schemes are agreements in which competitors divide markets among themselves... allocate[ing] specific customers or types of customers, products, or territories among themselves.'[85]

Although *keiretsu* agreements cannot be directly defined as market allocation agreements, nonetheless, 'under *keiretsu* agreements business is allocated to certain suppliers' due to their complex connections and the need to maintain them.[86] In China, market allocation is usually implicit and harder to detect, especially since firms often avoid using contracts, and prefer unofficial forms of agreements.[87] Nonetheless, de facto market allocation often accompanies *guanxi* based marketing strategies. This phenomenon originates from firms' tendencies to concentrate on a group of clients, with whom they are already connected,[88] limiting firms' abilities to enter new markets and increase a firm's market share, thus resulting in de facto market allocation.

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82. Xin (n 79) 1644-5; Zhou (n 63) 678; Seung Ho Park and Yadong Luo, '*Guanxi* and Organizational Dynamics: Organizational Networking in Chinese Firms', 22(5) [2001] SMJ 459.

83. Fox (n 49) 22.

84. Su (n 63) 684; Firms are 'often careful on who they extend their *guanxi* to, since they can become a potential competitor for the same resources' Standifird (n 13) 343.

85. 'Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For' Department of Justice, <http://www.justice.gov/atr/public/guidelines/211578.htm> accessed 1 March 2011.

86. Davidow (n 48) 1045.

87. Lou (n 43) 50-1.

88. Standifird (n 13) 342-43, 58; Bennett (n 4) 75-7.

Furthermore, it seems that government officials' involvement[89] may serve as a catalyst,[90] further strengthening this problem. This is especially true in 'sensitive industries such as cars and technology', where 'Chinese bureaucracy [...] appears to be allocating a share of the market to domestic companies', in addition to the promulgation of new regulations mandatorily requiring international enterprises 'to work with officially designated Chinese partners'.[91]

d. Discrimination: Domestic Firms Advantage over Foreign Firms

> 'We Westerns... will always remain 'visitors' and 'secondhand people''.[92]

Japanese companies are often reluctant to deal with foreign competitors (both for import and export purposes), making international trade in Japan quite difficult.[93] As previously discussed, 'Japanese suppliers are more likely to trust Japanese' firms,[94] hence foreigners are likely to face more obstacles than their local competitors, resulting in significantly higher operational cost; creating, therefore, the appearance of a de facto discrimination against foreign firms (whether this discrimination is actual or merely an impression is debatable).

In China, firms' 'ability to claim preferential treatment regardless of current market conditions', by relying on their *guanxi*, provides them with a 'long run competitive edge',[95] resulting in the impression of discriminatory treatment.[96] This impression is not entirely un-based. As presented by Luo, 'foreign

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89. Lou (n 43) 302.

90. Lou (n 60) 1326.

91. *The Economist* (n 67).

92. Fang (n 16) 231.

93. Razin (n 18) 372-73.

94. Dyer (n 10) 661-62.

95. Bennett (n 4) 75-76; Standifird (n 13) 342.

96. 'A recent survey by the American Chamber of Commerce in China found that a high proportion of

companies encounter the liabilities of foreignness in *guanxi* cultivation and development, whereas local firms have an important edge.'[97] In addition, Ross explains that, 'Western firms are seen as representatives of their countries' thus subjecting them to additional considerations, other than economic,[98] which contributes to their fear of discrimination. One example for this type of national association is the massive Chinese boycott of French firms, such as *Carrefour* and *Louis Vuitton* in 2008, as a reaction the troublesome passage of the Olympic torch through Paris, caused by pro-Tibet protestors.[99]

Discrimination against foreign investors is especially likely to occur in pillar industries dominated by SOEs (such as vehicles, technology, natural resources, telecommunication and so on),[100] as well as their supplementary sectors, where good relations with the government are paramount.[101] In these sectors, elements of national security, trust and fear of foreign interests, affects the strategic decisions of corporations. In order to assure that Chinese interests are being well protected the Chinese government may show domestic firms preferential treatment by adopting the specific standards used by the Chinese competitor, and rejecting the foreign standard systems. For example, both Sony and Intel were forced to 'rejig their software to a Chinese standard 'in the interests of national security', as well as requiring them to cooperate with 'officially designated Chinese partners'.[102]

American firms ... feel that they are the victims of discriminatory or inconsistent treatment.' 'The panda has two faces' The Economist (31 March 2010) <http://www.economist.com/node/15814746> accessed 9 January 2011.

97. Luo, *Guanxi and Business* (n 60) 43.

98. Ross, 'Communitarian Capitalism: A 'Market' Model for China? (n 5) 26.

99. '*Carrefour* faces China boycott bid' BBC (15 April 2008) <http://news.bbc.co.uk/2/hi/7347918.stm> accessed 24 November 2011.

100. Ross, 'Litigation Under China's Anti-Monopoly Law' (n 55) 4-5.

101. Hanbury-Tenison, 'Taxi trip to success in Shanghai' (n 60); Fox (n 49) 22.

102. *The Economist* (n 67).

In addition, foreign investors may experience discriminatory treatment through a selective and inconsistent enforcement of corruption related laws. Foreign investors have a higher chance to be prosecuted for illegal conduct, even in cases where the behaviour in question merely consists of market customary practices, commonly performed by the domestic competitors.[103] In fact, 'in the last decade, the percentage of corruption cases [...] aris[ing] from international trade or involv[ing] foreign business entities is surprisingly high, accounting for almost two thirds of investigations that have resulted in a penalty'.[104]

IV. ISSUES OF LEGALITY: CHINA'S ANTI-MONOPOLY LAWS AND EXTRATERRITORIAL JURISDICTION.

The previous chapters explained what the *guanxi* system is, and highlighted its influence on competition by comparing it to the *keiretsu*. This section will explore different legal issues arising from *guanxi* system's adverse effect over competition, including the issues of applicability of domestic laws and extraterritorial jurisdiction. Since the aim of this essay is to illuminate the *guanxi* system, this chapter will focus on the legality of this system, while using the *keiretsu* groups only as a tool for clarification and bridging the literature gap.

[103.] Ariel Ye and James Rowland, 'Offering Gifts of Travel and Entertainment in China - What if the Recipient is a State Functionary', *King & Wood* (April, 2010) <http://www.kingandwood.com/article.aspx?id=Offering-Gifts-of-Travel-and-Entertainment-in-China-What-if-the-Recipient-is-a-State-Functionary&language=en> accessed 10 October 2011.

[104.] ibid.; Vivienne Bath, 'China, International Business, and the Criminal Law' [2011] APLPJ 7.

a. The Chinese Competition Laws

When Razin tried to determine whether the *keiretsu*'s anti-competitive practices could be defined as illegal, she defined three criteria: the existence of the effect, the causation (anti-competitive behaviour causing the effect) and finally the applicability of domestic competition laws on the questionable behaviour.[105] The previous chapter proved the first two requirements; this part will discuss the applicability of the Chinese competition laws, the 'opting-out' clauses under the Anti Monopoly Law 2007 (AML), the role of the SOEs and problems of enforcement. Is *guanxi*'s influence over competition illegal under Chinese law?

China's first competition law was promulgated in 1993,[106] and though it marked a significant step in China's legal development, it was highly flawed.[107] A considerably more important legislation is the AML,[108] which came into effect on August 2008,[109] and 'provides a holistic framework for the regulation of competition.'[110] In addition, complementary regulations[111] were published by SAIC,[112] significantly clarifying some of the vagueness

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105. Razin (n 18) 379.

106. AUCL: Anti-unfair Competition Law.

107. Hamner (n 54) 385, 401-2. The Anti-Unfair Competition Law of 1993 had many limitations, among others were the fact that 'the legal liability system [was] flawed and cannot effectively curb unfair competition acts', <http://eng.hi138.com/legal-papers/economic-law-papers/200910/146466_how-to-improve-chinas-antiunfair-competition-law.asp>; accessed 19 November 2014 Daniel Sokol, 'China's Antimonopoly Law – One Year Down' (*Antitrust & Competition Policy Blog*, 6 October 2009) <http://lawprofessors.typepad.com/antitrustprof_blog/2009/10/chinas-antimonopoly-lawone-year-down.html> accessed 20 November 2014.

108. AML: Anti Monopoly Law 2007.

109. Paul Jones, 'The Anti-Monopoly Law: Still a Work in Progress' 4(4) [2008] CLR 3, 5-6.

110. Huang (n 47) 337.

111. Monopolistic Agreements (MAR), Abuse of Dominance (ADR) and Abuse of Administrative Power (AAPR).

112. SAIC: State Administration of Industry and Commerce

surrounding the AML.[113] This part of the essay will analyse all of these legislations, regulations and cases, in order to establish whether the *guanxi* system's influence over competition can, in fact, be defined as illegal.

The foreclosure effect and limitations of market 'openness', as explained in the previous chapter, can be side effects of the *guanxi* system, since they influence access to resources, government contacts, licenses and so on.[114] Many of these practices can be defined as illegal under the chapter V of the AML, which stipulates that administrative authorities are prohibited from abusing their power to discriminate against non-locals in technical standards, licensing, fees, entry and establishment etc.[115] For example, the practice of agencies issuing marriage licenses to require that license photos are to be taken at designated photo studios 'is declared illegal under Article 32.'[116] Furthermore, the AML proscribes firms from entering into agreements which restrict technological development.[117] Therefore, Chinese firms with less innovative products will not be able to rely on their connections to ensure their product triumphs over the competition.

These restrictions are reinforced by Art 17(3) and Art 17(4) of the AML, prohibiting firms with a dominant market position from refusing transactions and forcing counterparties, to transact only with them, without a valid reason. These articles may also apply to adverse competition phenomenona

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113. Susan Ning, Lining Shan, Liu Jia and NG Angie, '3 rules which shed light on non-price violations of the Anti-Monopoly Law - effective 1 February 2011', (*King & Wood Mallesons*, 10 January 2011) <http://www.chinalawinsight.com/2011/01/articles/corporate/antitrust-competition/procedural-rules-re-administrative-enforcement-of-antiprice-monopoly-effective-1-february-2011/> accessed 7 November 2014.

114. Standifird (n13) 342, 351; Hanbury-Tenison, 'Web offers a comfortable fit' (n 60).

115. AML Art 32, 33, 35; further developed in AAPR.

116. Owen (n 40) 255.

117. AML Art 13 (4).

such as vertical boycott and market foreclosure effect, originating from *guanxi* based commercial practices (exclusive and reciprocal dealing, long-term commitment and so on).[118] Furthermore, Art 7(2) and Art 18(2) of the Administrative Measures for Fair Transactions By and Between Retailers and Suppliers,[119] specifically refer to vertical boycott by stating that, neither retailers nor suppliers are to engage in restrictions to supply products or services to other retailers or suppliers.[120]

In the *Shanda* case,[121] Shanda and Xuanting allegedly 'abused their dominance in the Chinese online literature market by restricting the authors of Star Change Sequel from transacting with Sursen, without a valid reason', which violated Art 17(4) of the AML.[122]

Whereas in the *Huzhou TPRI*[123] case, the TPRI allegedly 'abused its dominance by blocking the [plaintiff's] access to the market for the supply

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118. AML Art 13 (5) prohibits horizontal collective boycott's agreements and MAR prohibits participating in a joint boycott of customers and suppliers. 'Briefing: China issues Guidance on Anti-Competitive Practices' (*Freshfields Bruckhaus Deringer*, January 2011) <http://www.*Freshfields*.com/uploadedFiles/SiteWide/Knowledge/China%20issues%20guidance%20on%20anticompetitive%20practices.pdf > accessed 9 November 2014.

119. Administrative Measures for Fair Transactions By and Between Retailers and Suppliers (零售商供应商公平交易管理办法) [Lingshoushang Gongyingshang Gongpingjiaoyi Guanli Banfa] (promulgated October 12, 2006, effective November 15, 2006).

120. Ding Liang, 'The Interplay of Non-compete Covenants under the PRC Anti-monopoly Law' (*King & Wood Mallesons*, April 2008) <http://www.kingandwood.com/article.aspx?id=The-Interplay-of-Non-compete-Covenants-under-the-PRC-Anti-monopoly-Law-04-china-bulletin-2008&language=en> accessed 10 October 2011. This issue was also addressed to in MAR Art 5(4).

121. *Beijing Sursen Electronic Technology Co Ltd v Shanda Interactive Entertainment Ltd and Shanghai Xuanting Entertainment Co Ltd.*

122. Susan Ning, Liang Ding and NG Angie, 'Sursen v Shanda and Xuanting - Abuse of Dominance Case Dismissed' (*King & Wood Mallesons*, 2 October 2010) <http://www.chinalawinsight.com/2010/10/articles/corporate/antitrust-competition/sursen-v-shanda-and-xuanting-abuse-of-dominance-case-dismissed/> accessed 3 March 2011.

123. *Huzhou Yiting Termite Prevention Service Co Ltd v Huzhou Termite Prevention Research Institute* [2010].

of termite prevention services.'[124] While there is no direct reference to *guanxi* in either of these cases, both of them illustrate that actions can be brought against firms for practices associated with *guanxi*.

The *guanxi* system is also notorious for using 'tie-in' dealings to sell less-successful products, which was addressed in the *WSC*[125] case. This was a case where the WSC (Wuchang Salt Company) was accused of violating Art 17(5) by 'making their supply of salt contingent on purchase of ...washing detergent powder.'[126] However, it should be noted, that this prohibition refers only to firms with a dominant market share, which might be very hard to prove since the burden of proof is on the plaintiff.[127] Though the SAIC rules name difficulty of switching to other trading partners,[128] as one the criteria to decide whether a business operator has market dominance, it is not clear that the difficulty resulting from *guanxi* based commitments can be a sufficient reason to establish dominance.

Another aspect of the *guanxi* influence is market allocation. Both the

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124. Susan Ning, 'China: Termites and Abuse of Dominance' (Mondaq, 17 October 2010) <http://www.mondaq.com/article.asp?articleid=112960> accessed 4 March 2011.

125. *Wuchang Salt Company* [2010].

126. Susan Ning, Ziqing Zheng and NG Angie, 'What Constitutes Anticompetitive Tying in China? The Wuchang Salt Company Case' (*King & Wood Mallesons*, 30 November 2010) <http://www.chinalawinsight.com/2010/11/articles/corporate/antitrust-competition/what-constitutes-anticompetitive-tying-in-china-the-wuchang-salt-company-case/> accessed 3 March 2011.

127. China Netcom case, Susan Ning, Liang Ding and NG Angie, 'Li Fangping vs China Netcom - Abuse of Dominance Case Dismissed' (King & Wood Mallesons, 19 September 2010) <http://www.chinalawinsight.com/2010/09/articles/corporate/antitrust-competition/li-fangping-vs-china-netcom-abuse-of-dominance-case-dismissed/> accessed 4 March 2011; and Baidu case Lester Ross, 'Litigation Under China's Anti-Monopoly Law' 1 [2010] CPIAJ 2, 5.

128. Susan Ning and Jia Liu, 'Comparison of the NDRC rules and the SAIC rules on Abuse of Dominant' (King & Wood Mallesons, 1 February 2011) <http://www.chinalawinsight.com/2011/02/articles/corporate/antitrust-competition/comparison-of-the-ndrc-rules-and-the-saic-rules-on-abuse-of-dominant/> accessed 3 March 2011.

AML[129] and the MAR[130] identify agreements for market and customers allocation as illegal.[131] In *The Concrete Manufacturers* case, the Construction Machinery Industry Association of Lianyungang City together with sixteen concrete manufacturers, were found guilty of allocating market shares among themselves, thus breaching the AML Art 13(3).[132] Though this case demonstrates that the law may be enforced on market allocation agreements, since *guanxi* based agreements are implicit, they will be very hard to detect, and therefore very hard to prove.

The issue of discrimination is regarded as one of the most urgent problems deriving from *guanxi*, especially for foreign investors. Discriminatory treatments[133] have generated the most litigation so far. It is prohibited both under Art 17(6) of the AML, in cases of abuse of dominance, and under Art 33, which refers to abuse of administrative power. Both in the *China Netcom* case[134] and the *China Mobile* case[135] the defendant allegedly discriminated against customers by implementing 'differential treatment'. Both of these cases refer to general sale strategies taken by companies for private customers. However, business-to-business strategies will be harder to

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129. AML Art 13(3).

130. MAR: SAIC Regulations on Prohibiting Monopoly Agreements Art 2 prohibits the division of the market by neither the sellers nor the buyers.

131. 'Briefing: China issues Guidance on Anti-Competitive Practices' *Freshfields* (n 118); As some market allocation agreement can de facto function as a 'non-compete clause', they may be rendered illegal under AML Art 13 which defines monopoly agreements as 'agreements, decisions or some concert of action that eliminates or restricts competition'; Liang (n 120).

132. 李方平诉中国网通集团 (*Li Fangping v China Netcom*) [2010].

133. 周泽诉中国移动 (*Zhou Ze v China Mobile*) [2009].

134. Ning, 'Li Fangping vs China Netcom - Abuse of Dominance Case Dismissed' (n 125).

135. Susan Ning, Liang Ding and NG Angie, 'Zhou Ze v. China Mobile Beijing - Alleged Abuse of Dominance Case' (King & Wood Mallesons, 29 October 2010) <http://www.chinalawinsight.com/2010/10/articles/corporate/antitrust-competition/zhou-ze-v-china-mobile-beijing-alleged-abuse-of-dominance-case/> accessed 4 March 2011.

prove, since one client may not be aware of the deal offered to another. The *Yuyao*[136] case is a more representative case for *guanxi*-based discrimination. In this case, the plaintiff accused the defended, while referring to chapter V of the AML, for discriminating against him, by preventing him from establishing a service centre when its competitor was allowed to.[137] Though this type of behaviour was considered to be part of the norm in the past, it seems that the introduction of the AML might have started to change this perception.

(i) Restriction to the application of Anti Monopoly Laws

While *guanxi* practices could be seen as illegal under some articles of the law, the law also provides articles that exempt firms from legal liability, even when they de facto violate it. Both the articles regarding monopolistic agreements and abuse of dominant market share include 'opt-out' clauses. Art 15 of the AML exempt firms from legal liability when the monopolistic agreements are made in order to improve technologies, develop new products, upgrade the quality, reduce production costs and so on. In addition, small and medium business sized operators are also exempt from legal liability when the agreement is made for the purposes of improving efficiency and enhancing competitiveness.[138] When taking into consideration the fact that 97.3% of the enterprises in China are small or medium size,[139] it appears that the law provides firms with a big loophole,[140] enabling them to rely on *guanxi* based monopolistic

136. 浙江余姚名邦税务师事务所诉余姚市政府 (*Zhejiang Yuyao Mingbang Tax Accountants v Yuyao City Administration*) [2008].

137. Jones (n 109) 10-11.

138. AML Art 15(3).

139. 'China's Statistical Yearbook 2013', China Statistics Press <http://www.stats.gov.cn/tjsj/ndsj/2013/indexeh.htm> accessed 18 November 2014.

140. Owen (n 40) 250.

agreements, as long as their purpose falls under the Art 15's 'protective umbrella'.

In addition, Art 17 of the AML, prohibits non-price related practices when they lack a valid reason 'which is self evidently open to subjective interpretation.'[141] Hence, firms hold a large manoeuvring space to abuse their dominant position. The ADR, on the other hand, provides two standard definitions of what constitute a 'valid reason'. The first, whether or not they are part of the normal operating activities, the second, their impact on 'the economic operation efficiency, social public interests and economic development.'[142] Although these provisions provide some degree of clarity, the final interpretation is left to the courts,[143] which have determined that both 'operational risk'[144] and defending intellectual property rights[145] constitute 'valid reasons'.

(ii) SOEs and Problems of Enforceability

The law firm 'Lovells', in an early report regarding the AML, stated that: 'the most worrying aspect of all the AML is the lack of effective safeguards to protect foreign and domestic investors from abuse of dominant market position by SOEs.'[146] This fear is not completely without its basis, since

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141. Lovells, 'The Anti-Monopoly Law of the PRC-Caveat Who?' (2007) 1 AF <www.lovells.com> accessed 4 March 2011, 5.

142. Ning, 'Comparison of the NDRC rules and the SAIC rules on Abuse of Dominant' (n 126); Ning, '3 rules which shed light on non-price violations of the Anti-Monopoly Law - effective 1 February 2011' (n 113).

143. 'In the Tencent case, the court made a lengthy analysis of justification possibilities...the court referred to general civil law and tort law rules about justifiable 'self-defense' and 'damage avoidance' measures.' Adrian Emch and Jonathan Liang, 'Private Antitrust Litigation in China—The Burden of Proof and Its Challenges' (Competition Policy International, April 2013) 1 CPI Antitrust Chronicle 11 <http://awards.concurrences.com/IMG/pdf/private.pdf> accessed 19 November 2014.

144. China Netcom case. Ning, 'Li Fangping vs China Netcom - Abuse of Dominance Case Dismissed' (n 125).

145. Shanda case; Ning 'Sursen v Shanda and Xuanting - Abuse of Dominance Case Dismissed' (n 122).

146. Lovells (n 138) 8.

although China has privatised many economic sectors, certain key sectors still remain under state control.[147] While some interpretations claim that Art 7 of the AML exempts SOEs from the full application of the law, others have determined that Art 7 is not exhaustive, hence AML should apply.[148] In reality, it seems that the latter is applied, since there have already been several cases regarding the enforcement of the AML on SOEs.[149] Nonetheless, it is highly unlikely that many foreign investors will be willing to take 'action against any part of the Chinese government when they trade in the area under administration.'[150]

In addition, the extent to which the law will be enforced on SOEs, is still unclear.[151] In 2013 there have been two cases in which SOEs were found guilty of anticompetitive behaviour, namely RPM,[152] both of which in the premium liquor industry.[153] While, these two cases can be seen as a sign that the SOEs are not 'immune' to the AML, the limited number of cases, as well as the high similarity between them, make predictions regarding future enforcement of the AML on SOEs rather vague.

As for the question of enforceability, it is often said that 'China's written laws do not necessarily reflect what happens in practice',[154] and the Chinese legal

147. Owen (n 40) 243.

148. Huang (n 47) 347.

149. *WSC* case, *China Mobile* case and *Huzhou TPRI* case.

150. Lovells (n 138) 2.

151. Owen (n 40) 246.

152. RPM: Minimum Resale Price Maintenance.

153. Ning (March 1, 2013) Susan Ning, Liu Jia and Hazel Yin, 'Chinese Antitrust Authorities Imposed Large Fines on Kweichow Moutai and Wuliangye for Resale Price Maintenance' (*King & Wood Mallesons*, 1 March 2013) < http://www.chinalawinsight.com/2013/03/articles/corporate/antitrust-competition/chinese-antitrust-authorities-imposed-large-fines-on-kweichow-moutai-and-wuliangye-for-resale-price-maintenance/>.

154. Hamner (n 54) 401-2.

system is considered to be weak and unreliable.[155] Many foreign firms find it impossible to enforce an award,[156] especially since officials are reluctant to expose information.[157] Enforcement of the AML is bound to be even more difficult. Not only do China's enforcement agencies have limited resources, but China also utilises a dual enforcement system, combining both Civil Action and Administrative Review;[158] causing jurisdictional overlaps.

It should be noted, that of the 643 cases cleared by MOFCOM[159] from 2008 to 2013, the MOFCOM imposed conditions on only 18 of them (2.8%) and rejected just one case (0.16%).[160] The majority of these 19 cases dealt with the issue of acquisition (89.5%) and all involved foreign enterprises.[161] Even

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155. Lou, Partnering with Chinese Firms (n 43) 50-51; Stanly Lubman, 'The Study of Chinese Law in the United State: Reflection on the Past and Concerns about the Future' 2(1) [2003] *Wash U Global Stud L Rev* 1, 26.

156. In 1994, 31 foreign banks failed to collect $600 million from SEOs; Dixon (n 15) 31.

157. For example: officials may refuse to divulge the company's assests, making enforcement of an award against it close to impossible. Randell Peerenboom, 'Seeking Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC' 49 [2001] Am. J. Comp. L. 249, 292-3.

158. Susan Ning, Kate Peng, Jia Liu and Rui Li, 'The Dual System of Anti-monopoly Law – The Interplay between Administrative Enforcement and Civil Action' (*King & Wood Mallesons*, 12 September 2013) <http://www.chinalawinsight.com/2013/09/articles/corporate/antitrust-competition/the-dual-system-of-anti-monopoly-law-the-interplay-between-administrative-enforcement-and-civil-action/> accessed November 8 2014.

159. MOFCOM: Ministry of Commerce People's Republic of China.

160. 'The merger which was not approved was Coca-Cola Company's (Coke) proposed acquisition of China Huiyuan Juice Group Limited (Huiyuan).' Susan Ning, Jiang Liyong, Zheng Ziqing, and Angie Ng, 'Merger Control Review 2009 – China' (King & Wood Mallesons, September 17, 2010) <http://www.chinalawinsight.com/2010/09/articles/corporate/antitrust-competition/merger-control-review-2009-china/> accessed November 8 2014.

161. When comparing the MOFCOM to the USA Bureau of Competition and Antitrust Division it is quite clear that the MOFCOM still has a long way to go; in the fiscal year 2013 alone 1,326 transactions were reported to the 2 American agencies, 23 mergers were enforced by the Bureau of Competition and another 15 cases by the Antitrust Division. Thus it appears that in 2013 alone the two agencies handled more than twice as many cases as the MOFCOM did in 5 years. Bureau of Competition and Antitrust Division, 'Hart-Scott-Rodino Annual Report' (Fiscal Year 2013 Thirty-Sixth Annual Report) Hart-Scott-Rodino Antitrust Improvements Act of 1976 Section 7A of the Clayton Act pp. 1-2, 5 < http://www.ftc.gov/system/files/documents/reports/36th-report-fy2013/140521hsrre port.pdf > accessed 9 November 2014.

in cases where conditions were made, proper supervision was often proven to be challenging at best,[162] thus rendering the conditions as 'somewhat irrelevant'. Furthermore, from 2008 until 2012, China's civil courts have accepted 107 AML related cases[163] of which only few were resolved in a verdict in favour of the plaintiff.[164] This can be seen as another indication for the law's limited enforceability.

b. Extraterritoriality Jurisdiction: application of American antitrust laws

The above part showed that although *guanxi* influence may be defined as illegal under AML, the 'opt-out' clauses, as well as questionable status of the SOEs, makes the application of this law unreliable. Hence, American firms, in order to protect their interests, might want to apply their domestic antitrust laws. While there has been no legal research regarding application of US antitrust laws on the *guanxi* system, many has been written on its application on the Japanese *keiretsu*, mainly due to pressure exerted by US companies on the government for legal assistance.[165] The strong similarities between the two systems allow us to examine the potential application of antitrust laws on the *guanxi* system through the existing theoretical framework.

[162.] Susan Ning, Hazel Yin, Ziqing Zheng and Kailun Ji, 'Review of Merger Control and Merger Remedies Regime in China: From 2008-2013' (*King & Wood Mallesons*, 23 August 2013) <http://www.chinalawinsight.com/2013/08/articles/corporate/antitrust-competition/review-of-merger-control-and-merger-remedies-regime-in-china-from-2008-2013/> accessed November 8 2014.

[163.] Susan Ning, Hazel Yin and Yunlong Zhang, 'The Anti-Monopoly Law of China: What We Have Seen in 2012?' (*King & Wood Mallesons*, 8 February 2013) <http://www.chinalawinsight.com/2013/02/articles/corporate/antitrust-competition/the-anti-monopoly-law-of-china-what-we-have-seen-in-2012/> accessed November 8 2014.

[164.] ibid; Susan Ning, Li Rui and Hazel Yin, 'Chinese Consumer Wins Abuse of Dominance Civil Action against Tie-in Sales in Program Bundling' (*King & Wood Mallesons*, 6 April 2013) <http://www.chinalawinsight.com/2013/04/articles/corporate/antitrust-competition/chinese-consumer-wins-abuse-of-dominance-civil-action-against-tie-in-sales-in-program-bundling-2/ > accessed November 8 2014.

[165.] Davidow (n 48) 1035.

American antitrust law is aimed at 'protecting the national economy against both domestic and international restraints on competition'.[166] The effect doctrine, a central principle in the antitrust law, was established in the *Alcoa* case, where the Judge stated that: 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its border...'[167] However, this interpretation was soon limited by the balancing test, which requires courts to consider the interest of international comity,[168] introduced and developed in the *Timberlane* case[169] and the *Mannington Mills* case.[170] The effect doctrine was further limited in 1982 with the FTAIA enactment,[171] which referred to non-import trade or commerce. The FTAIA stated that federal courts had jurisdiction on business activities outside of the US, only when there was a 'direct, substantial, and reasonably foreseeable effect' on the domestic market.[172]

It is this 'jurisdictional hurdle' that led most researches to conclude that the application of antitrust to *keiretsu* is not probable. Davidow claims that the 'American antitrust role will ... be limited for the foreseeable future', and that the issue of the *keiretsu* will 'most likely will be solved by changes in corporate practice in Japan.'[173] Tamura argued that the application of the

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166. Jiro Tamura, 'US Extraterritorial Application of Antitrust Law to Japanese Keiretsu' 25 [1992-1993] NYUJLIP 385, 386.

167. Muchlinski (n 6) 134; *US v Alcoa* 148 F 2d 443 (2d Cir 1945).

168. Tamura (n 164) 389-90.

169. *Timberlane Lumber Co v Bank of America* 459 F 2d 597 (1976 Ninth Circuit).

170. *Mannington Mills Inc v Congoleum Corp* 595 F 2d 1287 (1979).

171. FTAIA: Foreign Trade Antitrust Improvements Act of 1982.

172. Tamura (n 164) 390; Though the FTAIA have significantly limited the extraterritorial application of antitrust laws, American courts still managed to assert their jurisdiction over foreign entities; as was the case in the Hartford Insurance Case, where the US supreme court applied US laws on activities occurring for the most part on British soil, Muchlinski (n 6) 138-39.

173. Davidow (n 48) 1050.

antitrust law is not likely to 'reach Japan domestic activity'[174] and that 'it would be unwise to attempt to apply American law to *keiretsu*.'[175]

In China, Western firms might be frustrated by the fact that 'competitors lacking any commercial business advantage succeed at [their] expense solely because they have better connections.'[176] However, the ability to apply extraterritorial jurisdiction to *guanxi* is even more unlikely than to the *keiretsu*, as the *guanxi* system is even less direct and more flexible than the *keiretsu*. *Guanxi* ties rely on the implicit understanding between the parties; furthermore, defining the system's boundaries is next to impossible, as the system is best described as a 'spider-web'. This differentiation, thus, re-enforces the difficulties faced by American companies when attempting to apply extraterritorial competition laws in the Japanese domestic market. Therefore, relying on American laws to insure a foreign firm's interests seems to be an improbable and impractical solution.

V. CONCLUSION

Though some people are inclined to believe that with the economic development *guanxi* will become a thing of the past,[177] reality teaches us differently, since *guanxi* remains one of the keys to success.[178] This paper shows that the *guanxi* and *keiretsu* systems share common features, resulting in similar adverse influences over competition. The *guanxi* system manipulates competition in the Chinese domestic market limiting market 'openness', especially to foreign competition.

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174. Tamura (n 164) 392.

175. ibid 399.

176. Dixon (n 15) 28.

177. Selmer (n 2) 37.

178. Hanbury-Tenison, 'Taxi trip to success in Shanghai' (n 60).

Since foreign companies often struggle to build their own *guanxi*, which would enable them to compete on equal terms, as those require both time and a common social base,[179] they may wish to turn to the law to 'level the playing field'. However, though many of the *guanxi* originated practice can be defined as illegal under the domestic law, the various loopholes combined with the ambiguity surrendering the status of SOEs and enforceability problems decreases firms' abilities to rely on the domestic legal system. Thus, leading firms to seek protection elsewhere, thereby; exploring the possibility of extraterritorial jurisdiction. Yet, while the possibility of relying on extraterritorial jurisdiction for protection may seem enticing, further examination of American companies' past experience in attempting to utilise this tool against the *keiretsu*, demonstrates the futility of this solution.

As both solutions fail to offer proper protection to international enterprises operating within the Chinese domestic market, those may wish to look into future developments. Recently, many Chinese firms started looking to the West, in the hope of expanding their markets abroad.[180] This aspiration of Chinese firms can have unpredictable consequences, since US courts will not only have jurisdiction over behaviour within their forum jurisdiction, but they may also assert jurisdiction over 'non-resident unit acts outside the jurisdiction',[181] when those have a damaging effect on the domestic market.[182]

The second possible development is bilateral antitrust cooperation, which

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179. Lou, *Guanxi and Business* (n 8) 4-6; Fang (n 16) 119; Wank (n 7) 829-31.

180. Duncan Hollis, 'What will a U.S.-China BIT do to Investor-State Arbitrations?' (Opinio Juris, 22 March 2010) <http://opiniojuris.org/2010/03/22/what-will-a-us-china-bit-do-to-investor-state-arbitrations/> accessed 1 March 2011.

181. Muchlinski (n 6) 140.

182. ibid 141.

aims at promoting coordination and harmonization.[183] The US signed several agreements of this nature as part of the US' attempt to solve the jurisdiction problem. Hamner argues that by adopting an international antitrust regime, countries will be able to reduce both conflicts in laws and the costs of compliance.[184] This might be a possible solution to the problem of extraterritorial jurisdiction, which will improve the ability of American firms to protect their interests, without alienating the Chinese authorities. In fact, China has already made some progress in this area, by establishing such an understanding with the EU.[185] However, the effectiveness of both of these developments in regards to *guanxi*, is left to be seen.

183. Tamura (n 164) 398.

184. Hamner (n 54) 403.

185. 'Bilateral relations on competition issues' (European Commission, 11 June 2014) <http://ec.europa.eu/competition/international/bilateral/> accessed 18 November 2014.

Right of Integrity: Misleading, Irrelevant and Disappointing

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I. INTRODUCTION

Following the Kantian and Hegelian philosophy,[1] the protection of moral rights is underpinned by the often romanticised notion that creative works are an extension of its creator. Accordingly, 'to mistreat the work... is to mistreat the artist [and] impair his personality.'[2] Moral rights, as distinguished from economic rights, reflect the idea that the author's interest in the work transcends beyond his motives of financial gain. Parting with the copyright has no effect on the author's personal attachment to the work. This indissoluble connection of the creator with his work forms the background against which moral rights provisions have been formed, and sits uneasily with the orthodox view of copyright as a tradable commodity, an economic right.

The lack of statutory protection for moral rights has been the defining feature of the Anglo-American copyright tradition, which tends to be heavily contrasted with, and criticised by the Continental copyright systems. The elimination of such dichotomy between the Anglo-American and Continental systems through the introduction of the Copyright, Designs and Patents Act 1988 provisions caused some commentators to consider the adoption

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1. For a Kantian approach, see Kim Treiger-Bar-Am, 'Kant on Copyright' (2008) 25(3) AELJ 1059.

2. P Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991(2) Duke LJ (1991) 497.

of statutory moral rights as one of the most noteworthy developments.[3] Undoubtedly, the protection of moral rights portrays a society that values creation and authorship. It chimes with popular attitudes. In the legislative schemes of France and Germany, moral rights rank as a category equal to economic rights.[4] The terminology of moral rights itself suggests an unconditional entitlement rather than a right that must be legally acquired subject to limitations.[5] Provisions in the 1988 Act resembled the already existing rights afforded by the common law. This made their acceptance into English national law a logical development, particularly in view of the moral rights obligations imposed by article 6bis of the Berne Convention.[6] Such an acceptance, however, was made without inquiry into the effectiveness of the provisions and without thought as to how those provisions would interact with its parallel right of copyright (i.e. an economic right).

This paper will argue that the nature and scope of the moral rights regime reveals an embarrassing nod towards droit moral, the orthodoxy of which considers the authors of copyrightable works to have inalienable (non-transferable to third parties nor relinquished altogether) rights. The UK still preserves the prevalent reluctance towards moral rights from the earlier years, leaving the regime, as Vaver (1999) notes, in an 'impoverished state.'[7] Such an attitude is a reflection of the wider distaste felt towards subjugating the marketplace to higher dictates of good faith, propriety and principles of fairness.[8] It is of no surprise then that a host of limitations and exceptions

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3. see P Rigamonti, 'Deconstructing Moral Rights' (2006) 47 Harv Int'l LJ 353.

4. William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7edn, Sweet & Maxwell 2010) 513.

5. For terminological and conceptual difficulties regarding the expression moral rights, see David Vaver, 'Moral Rights Yesterday, Today and Tomorrow' (1999) 7(3) IJL & IT 271-272.

6. Berne Convention for the Protection of Literary and Artistic Works, Art 6bis, Sept 9, 1886, 828 UNTS 211.

7. Vaver (no 5) 272.

8. see Cornish (n 4) 514.

has been introduced to reduce the scope of moral rights applications to the point where they begin to occupy a mere symbolic existence. Independent rights such as defamation, economic torts and contract were already (and still are) available to aggrieved persons prior to the enactment of section 80 (right of integrity).[9] While this means that the authors may be no worse off under the new regime so long as there is a common law alternative, it raises questions as to: (i) whether the provisions should be retained given that they offer no real improvement from the common law that preceded it, and (ii) whether there is any other workable framework that will offer a more agreeable approach between copyright and moral rights provisions.

In view of the above, it is thought that greater harmonisation between the two entities of moral rights and copyright may be advanced by softening the dichotomy between economic rights and moral rights. Perhaps only then will the provisions not be treated as mere 'tokenism.'[10] This radical proposition has been largely left out from the majority of the intellectual property moral rights literature, which tends to ignore the political and economic dimensions at play. This paper, on the contrary, acknowledges and embraces the fact that the 1988 Act was the product of a political process that shaped the law according to the interests of the relevant parties.[11] Furthermore, while moral rights by their nature are considered non-economic, it will be shown that this does not render them void of significant economic benefit. A case will be made for looking at moral rights as not only an extension of

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9. This paper only explores the common law alternatives which relate to the right of integrity. Other actions such as passing off, breach of confidence and more are available as alternatives for other CDPA moral rights provisions (sections 77-79 and sections 84-85).

10. William R Cornish, *Moral Rights under the 1988 Act*, (1989) 11(12) EIPR 449, 452.

11. The 1988 Act has 305 sections and eight schedules. This in itself illustrates the possible acquiescence of the legislative body to political pressures from copyright industries groups. There is also the grant of immunities to large classes of work.

natural law (personal right) but also as an extension of the economic rights in copyright law.

The arguments framed will operate in relation to one of the moral rights most commonly afforded at a national and international level, the right of integrity (i.e. the right to object to derogatory treatment).[12] The justification for this particular focus resides in scholarly opinion that has conceived the right as being the most important of the moral rights,[13] as well as one that has 'aroused the most bitter antagonism.'[14] The right of integrity also encounters similar problems as the other rights afforded by the 1988 Act (right of attribution (section 77), right to object to false attribution (section 84) and the right to privacy (section 85)). This widens the future applicability of this paper.

It must be noted that those who have acquired copyright rights before 1989 are protected under Schedule 1 of the 1988 Act. Accordingly, the right of integrity applies to acts succeeding the August 1, 1989 Act's commencement. This caveat may lead to the arguments of this paper being condemned as premature conjectures, since many activities will remain untouched by the 1988 Act. However, Schedule 1 does not erase the possibility of providing a good indication as to where the future of moral right provisions in the CDPA 1988 lies.

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12. The paper will omit UK's disregard of the Berne Convention. The focus is paid to national obligations and case law only. The subject of Berne and the UK forms another paper on its own.

13. Cyrill P Rigamonti, 'Deconstructing Moral Rights' (2006) 47(2) HILJ 364.

14. Martin A Roeder, 'The Doctrine of Moral Right' (1940) 53 Harvard Law Review 565.

II. INTERPRETING THE STATUTORY LANDSCAPE

Protection of integrity gives the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film the right not to have his work subjected to derogatory treatment (section 80(1)), to the extent that they are subject to and remain in copyright (section 86(1)). 'Treatment' encompasses the addition to/deletion from/alteration to/and adaptation of the work (section 80(2)(a)). It is 'derogatory' if it amounts to 'distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author' (section 80(2)(b)). The right of integrity lasts for as long as copyright in the work. In the case of literary, dramatic and artistic works this usually means 70 years from the end of the year in which the author dies (see section 12).

The right does not extend to the preservation of the work nor does it protect the work from total destruction by another since no personality can be projected through a non-entity. The reputation or honour of the artist, likewise, cannot be affected, if no one can experience it, and so, 'if you receive a sculpture...you cannot paint it a new colour without the artist's permission. You can, however, smash it into unidentifiable pieces.'[15] Considering that the total destruction of a work erases the artist's efforts in its entirety, this to some, if not the majority, is just as harmful as any undesirable alterations, particularly in cases where the work is not widely reproduced.

The large number of exceptions to the right of integrity further curtails its scope of application. Computer programs and computer-generated

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[15.] Susan P Liemer, 'Understanding Artists' Moral Rights: A Prime' (1998) 7 BU PILJ 41, 51.

works do not qualify for protection[16] nor does any work used for reporting current events,[17] a newspaper or similar periodical or an encyclopedia or any collective work of reference.[18] The right does not apply in relation to translation (section 80(2)(a)(i)). Employees who produce works in the course of their employment, likewise, do not fall within the scope of the right of integrity. Some exclusions have important implications and doubts have been raised as to their justification. An architect of a derogatory building may only seek redress by sacrificing the right to be identified (section 80(5)). It is supposed then, that the non-attribution of a work will keep intact the reputation of the architect where the right of integrity has been infringed. This, however, only results in both moral rights being compromised. With regards to translations, Cornish is right to point out that 'of all the ways of misrepresenting an author's true work, poor translation must be easily the most unjustifiable.'[19] This holds particularly true when translations occur with such frequency.

Those falling within the ambit of such exceptions are left with no other alternative but reliance on common law. The fact that since coming into force, the 1988 Act has generated only four reported decisions where section 80 (right of integrity) is has been considered,[20] confirms the allegation that the route of litigating moral rights is not one usually sought. The exceptions may be seen as a result of greater weight given to economic rights and

16. Copyright, Designs and Patents Act 1988 s 81(2).

17. ibid s 81(3).

18. ibid s 81(4).

19. Cornish (n 4) 451.

20. *Morrison Leahy Music Ltd v Lightbound Ltd* [1993] EMLR 144; *Tidy v Natural History Museum Trustees* [1995] 39 IPR 501; *Pasterfield v Denham* [1999] FSR 168; *Confetti Records v Warner Music* [2003] EWHC 1274.

commercial considerations that enable the copyright owner[21] to exploit the work. Yet, Cornish positively maintains that while 'the new statutory provisions lay very considerable constraints on the operation of the new law, there also remains room for manoeuvre by the courts.'[22] Perhaps then, only the courts could address the imbalance between the personal and commercial interests.

III. COURTS APPROACH TO THE RIGHT OF INTEGRITY

Following from Cornish, the approach of the courts suggests little inclination to press moral rights liability beyond common law. From the above provisions, the success of the right of integrity will depend on whether the act done (i.e. the treatment) to the author's work will be (i) prejudicial to honour or reputation, and (ii) will amount to distortion or mutilation.

Rattee J in the case of *Tidy v Trustees of the National History Museum* held that the question of prejudice ought to be decided through the eyes of the reasonable person.[23] However, the question of whether the reasonable person is to be the reasonable artist or a reasonable member of the public was left undefined. The former would expand the instances where prejudice to honour or reputation would be recognised. Without a doubt, creators would be in a better position to understand the possible varieties of prejudice, which members of the public may regarded as trivial. However, it is clear that it is 'not sufficient that the author is himself aggrieved by what has occurred.'[24] This

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[21] Note that who holds the copyright may not necessarily hold moral rights to it, though the author of a work is usually the first owner of the copyright (see also section 11(1)).

[22] Cornish (n 4) 452.

[23] [1995] 39 IPR 501.

[24] *Pasterfield v Denham* [1999] FSR 168, 181.

is made even more difficult where prejudice is not to be inferred by the courts as such, but must be established by evidence. Lack of evidence for Lewison J in *Confetti Records* was 'the fundamental weakness in this part of the case.'[25] Evidence of status is also a prerequisite to establishing prejudice. Lewison J continued to say that if 'I have no evidence about Mr Alcee's honour or reputation... I have no evidence of any prejudice to either of them.'[26] The ramifications of this approach are that many new authors who are yet to establish their reputation will fall outside of the scope of the section 80 protection entirely. Many will also have their right circumvented if their injury is identified in terms of emotions, which will in turn prove to be too subjective to rule on (see *Pasterfield* below). A lower, perhaps more accessible threshold, would infer prejudice from the presence of a distortion of the author's expression.

The threshold for establishing derogatory treatment is even higher than that of establishing prejudice. In *Tidy*, the exact but miniature reproduction of work was not considered a mutilation. This is despite the fact that the originally black and white work was given a background colouring of pink and yellow and an additional text. Rattee J considered the text not to be part of the drawing, and so it fell outside of the 'treatment'. In *Pasterfield*, colour variations between originals and reproductions were, likewise, insufficient to fall within the meaning of mutilation. Such conclusions were reached despite the fact that both were not as aesthetically successful as the originals. *Pasterfield* suggested that only 'gross differences'[27] would qualify. At this point, the author's access to recourse against those that presented the work

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[25] *Confetti Records v Warner Music* [2003] EWHC 1274.

[26] ibid.

[27] *Pasterfield* (n 24) 182.

differently from the way he originally intended will only be available if the alterations and mutilations manifest themselves to be obvious and extreme examples of infringement upon the artist's creative work. Yet, given that the concepts of 'treatment', 'prejudice' and 'derogatory' are subjective this would inherently mean that the courts, in some cases, involve themselves in making aesthetics evaluations.[28] Such variables used to establish infringement and the judicial discretion granted in the area creates inconsistencies. *Morrison* did not require prejudice and *Tidy* required prejudice or distortion, but not both. This is contrary to *Pasterfield* and *Confetti*; both of which failed on the reasons of not having both elements present.

Given the above difficulties, it would be unreasonable for those authors that previously relied on common law to prevent alteration of their works to change that practice and rely on the provisions set out in CDPA 1988 instead. The author remains free to impose restrictions on his transfer of copyright. The copyright law would then become subdivided and would enable the author to retain some aspects of it and transfer the rest. Through this, the author may decline to transfer the right to alter or adapt the work. He may insist that it binds subsequent third parties to protect him against any potential future harm. Such an alternative would go beyond the right of integrity as it does not require the treatment of the work to be derogatory in the event of litigation. There is also a strong positive attitude to protect the obligations of the parties to the contract. However, since in most cases this can only be done under contract law, for most authors, it will be an uncertain source to be relied upon. While breach of contract was used to prevent derogatory treatment in

[28] Dangers of making aesthetic evaluations were discussed in *George Hensher Ltd v Restawile Upholstery* [1976] AC 64. Cornish dubbed this 'aesthetic prejudice' in 'Moral Rights Under the 1998 Act 12 EIPR 449 (1989) 451.

Frisby v BBC,[29] in *Barnett v Cape Town Foreshore Board*,[30] no express or implied terms could be determined for an architect to prevent alterations to his design. This reflects the idea that much is dependent on judicial discretion and the market reality where authors may form their own contractual terms only to the extent of their own individual bargaining power, which in turn will determine whether and to what extent the integrity interest is protected.

Yet, even with the above in mind, the courts appear to be more inclined to imply terms to limit the right to make alterations in contract in the absence of express terms. This was the case in *Joseph v National Magazine Co* where the court upheld the author's right not to have his article revised, declaring that the author was 'entitled to write his own article in his own style.'[31] The author was also awarded damages for the lost opportunity to enhance his reputation. Indeed, the courts invariably first attempted to reach a decision based on the construction of any existing contract, as opposed to any consideration of moral rights. *Tidy* was successful in mounting an action against the museum for breach of copyright, but the defendant's subsequent application for a summary judgment on the basis that the museum's publication constituted derogatory treatment was refused. In a similar vein, in *Morrison*, the infringement to the right of integrity was not dealt with at length since a copyright violation had already been established. The suggestion here is that a hierarchy between copyright and moral rights is observed by the courts, with copyright having precedence over moral rights issues.

29. WLR 1204.

30. [1978] FSR 176.

31. [1959] 1 LR Ch 20.

While critics observed that 'laws sometimes happened to protect it [i.e. moral rights],'[32] the law of defamation shows itself as more than a rough analogy to the right of integrity. The court in *Pasterfield* approved of Laddie's characterisation of section 80 as protecting reputation, akin to the law of defamation.[33] The object of protection is therefore the same. Relief under section 80 requires injury to reputation,[34] the same element of proof required for establishing defamation. An offensive cover in *Moseley v Stanley Paul* was stopped pending trial by an interim injunction, 'for the plaintiff to have it associated with his name or his book...would be a scandalous state of things.'[35] In *Lee v Gibbings*,[36] the author's original work was republished in a cheaper, smaller form with no preface, introduction or bibliography. The court held an action in defamation to be proper and prevented alterations to the work that diminished the author's reputation (for similar case see Humphreys v Thompson).[37] Such protection existed not only under common law, but also under section 43(4) of the Copyright Act 1956, which prohibited, amongst other things, publishing an altered work or a reproduction of it, as the unaltered work of the artist. The alteration, like the requirements of defamation and section 80, need to be material.[38] A paradox emerges since in *Carlton* the court allowed damages for the enlargement and addition of colour to a drawing, yet under the right of integrity in *Pasterfield*, the same variations and an additional text failed to fall within section 80 for want of major differences between the original and

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32. W R Cornish and J Phillips, 'Copyright in the United Kingdom' (1984) 119 Revue Internationale Du Droit D'Auteur 59, 115.

33. *Pasterfield* (no 24) 181; see H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (3rd edn, Butterworths, 2000).

34. s 80(2)(b) and *Confetti Records* [2003].

35. [1917-1923] 19 MCC 341, 342.

36. [1892] 67 LT 263.

37. [1905-1910] 18 MCC 148.

38. *Carlton Illustrators v Coleman* [1911] 1 KB 711.

altered work.[39] This suggests that the standard of section 43(4) of CA 1956 was in fact lower than that of the current section 80 in CDPA 1998.

The above cases would acquire no greater benefits under section 80. Infringement of moral rights is actionable as a breach of statutory duty (section 103(1)). The damages recovered on the sole basis of moral rights would be inadequate, as was emphasised in *Morrison*. The effect of distortion or mutilation, even if found, could not be quantified. There is also a derogation whereby an injunction will be refused where the defendant includes a disclaimer disassociating the author from the allegedly derogatory treatment of the work.[40] There is, however, a statutory guarantee by virtue of section 171(4) CDPA 1988 allowing authors to rely on rights other than moral rights.[41] Though, it is not clear whether this principle can be used to award additional damages for infringement of moral rights. Section 103 suggests that this is unlikely as it establishes a separate heading for infringements of moral rights itself.

The only reasonable case that can be made in support of section 80 is that authors are able to benefit from section 80 for as long as copyright exists in the work, whereas defamation, for instance, could only be asserted during the life of the author. The right of integrity also creates a default rule under which it is presumed that the author retains the right to object to certain treatments of his work, unless that right is specifically waived in whole or in part.[42] The default rule, however, if of marginal significance in view of the waiver regime.

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39. ibid.

40. Copyright, Designs and Patents Act 1988 s 82(2).

41. Copyright, Designs and Patents Act 1988 s 171(4).

42. No need to assert the right (cf. right of attribution).

IV. EROSION OF MORAL RIGHTS THROUGH A WAIVER REGIME

While the above represents restrictions and difficulties in making the right of integrity actionable, the waiver regime contained within the moral rights provisions gives way to commercial and economic interests in favour of the rules of the market. While moral rights cannot be assigned (section 94), this holds little importance when they can be affected by consent to acts which would otherwise constitute infringement (section 87(1)) or when they can be waived (section 87(2)). Lord Beaverbrook distinguished: 'consent in respect of moral rights [is] to operate like a license in respect of copyright; that is, it may be implied, expressed or signified by conduct... waiver is the giving up of rights in whole or in part... in favour of particular people or in favour of the world.'[43] However, there is little use of this distinction since the waiver, like consent, does not need to be permanent. Waivers, in the majority of cases, will be found in contract, but upholding the distinction between consent and waiver may open up possibilities of abuse since 'consent to the doing of particular acts ought to be given in any way whatever' (Lord Beaverbrook).[44] Though note that there are wider notions of fiduciary responsibility, duties of care, and unconscionability to soften some of the potential hostilities of the marketplace.

The existence of waivers, particularly when they are embedded as a prerequisite to any contractual agreement, leaves the author at a disadvantage. Although, a waiver must be in writing and signed by the person giving up the rights, which may offer comfort to some, this too is soon diminished by the fact that informal waivers under contract law and estoppel are permissible (section

43. HL Deb 10 December 1987, vol 491, col 395.

44. ibid.

87(4)). In business reality, most would be forced and the majority prepared to waive all moral rights in exchange for work with a desired company. Some would possibly lose moral rights by ignorance. This bargaining inequality would leave only the well-established authors in a position to negotiate and resist the demand for a waiver. Nonetheless, it may be specified whether the waiver is to be revocable or irrevocable by virtue of section 87(3)(b). It is unclear, however, whether in the absence of an intention to the contrary, a waiver that has no indication of revocability is automatically presumed to be revocable or otherwise. Unless the contract can be invalidated through some other means such as duress, undue influence, or restraint of trade, there is nothing to stop contracts containing standard clauses that insert the waiver of all moral rights. The author, accordingly, does not survive market exploitation.

The breadth of waiver provisions extinguishes any theoretical suggestions of the inalienability of moral rights. In fact, it is possible to contend that it transforms moral rights from what is meant to be a personal right to a property right, which is seen as being capable of having a market value. Such a contention is even more accurate when appropriate remuneration can be received in return for a signed waiver. It changes the non-economic character of moral rights. The Supreme Court of Canada in *Desputeaux* held that the Canadian Copyright Act 1985 'does not prohibit artists from entering into transactions involving their copyright or even creating revenue from the exercise of the moral rights that are part of it...an artist may even charge for waiving the exercise of his or her moral rights.'[45] In Britain, the House of Commons revealed that 'it should be made an offence...to offer a financial inducement or commercial advantage for the waiving or non-

[45] *Desputeaux v Editions Chouette* (1987) Inc [2003] 1 SCR 178, 57.

assertion of any moral right or to penalise an author who asserts or refuses to waive any such right.'[46] This concern, however, was not addressed in the final provisions. The renunciation of moral rights through a waiver would remove the opportunity to defend any future honour and reputation of the author in exchange for financial inducement. This brings moral rights closer to being associated with economic rights that can be bought or sold protecting commercial interests, rather than the personal rights of authors. Here, under the waiver regime, moral rights operate similarly to other forms of property. This contributes to the argument that is about to follow.

V. RECONCILIATION

The outlined inadequacies highlight the importance of reconceptualising moral rights in such a way as to produce a beneficial cooperation between copyright law as it exists and the moral right provisions in intellectual property law. Section 80 rights, which were designed to be rooted in the personality of the author proved to be rooted in commercially dictated considerations guided by economic interests. Moral rights are conventionally viewed as an extension of natural law, as a personal right. This convention, however, is not only limiting but also does not reflect the other side of moral rights identity. It is important to note that the personality argument itself is void of any broader social and economic context in which moral rights are asserted.[47]

A substantial body of literature exists on the economic aspects of intellectual property, yet none of these address moral rights and how the interaction

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46. HC Deb 28 April 1988, vol 132, col 570.

47. see also David Vaver, 'Authors' Moral Rights: Reform Proposals in Canada: Charter or Barter of Rights for Creators?' (1987) 25 Osgoode Hall Law Journal 754: analysis.

between the two (economic and moral rights) may be improved. Hansmann and Santilli are perhaps the only exception offering the most comprehensive economic analysis,[48] yet they too fail to elucidate as to what such an approach may offer with regards to the current state of moral rights.

The right of integrity is not void of economic benefits. In the context of waivers, it was seen how they operate as forms of property when they can be exchanged for remuneration. The right of integrity also has important commercial value to the creator and third parties. The art collector's investment will be devalued if the original artist's work is mistreated in such a way as to impact on his reputation. The artist himself, following any such incident, may receive less remuneration for future works and would be less susceptible to attracting new purchasers. Moral rights can therefore inadvertently protect pecuniary interest, which is traditionally left to the economic instruments. This function of moral rights has been largely ignored. While 'it may be distasteful to equate artistic endeavour with trade... the analogy is appropriate for the many authors who rely on their creative talents for their livelihood.'[49] It is suggested here that a creator who enforces his moral rights is also enforcing his economic interests, the interests of other owners of his work as well as the interests of the public at large who may potentially benefit from the work. This leads to the claim that the exceptions to the right of integrity outlined in the earlier part of this paper will diminish the potential economic benefit that can otherwise be derived, making a case for moral rights stronger.

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48. Henry Hansmann, Marina Santilli, 'Authors' and Artists' Moral Rights' (1997) 26(95) JLS .; see also Michael Rushton, 'The Moral Rights of Artists' (1998) Journal of Cultural Economics 15.

49. Vaver (n 47). For art enthusiasts see the background to The Death of Chatterton painting by Henry Wallis (1856).

Both entities of copyright and moral rights are unlikely to achieve perfect symmetry, but the dichotomy between them becomes less distinctive by shifting the perception of moral rights away from viewing them in isolation to recognising them as 'species' of personal rights as well as economic rights.[50] An acknowledgement of the convergence between the two would be the first step in improving the understanding of the conflicts to which moral rights give rise.[51] Given the political dimension of law, where the legislators are not the only arbiters of policy, but as some have strongly termed, 'hostages of strong lobby groups,'[52] bringing moral and economic rights into the same discussion would also ease the acceptance of moral rights, if they were more related, at least in theory, to economic considerations which are the guiding principle of the majority of copyright laws. Shifting the moral rights discourse to an economic level may well be one underexplored method that has the potential to have a progressive effect on the future development of moral rights and on the harmonisation of copyright and moral rights.

VI. CONCLUSION

While some commentators (Porter (1989), Stamatoudi (1997), Rigamonti (2006) et al).[53] conclude that moral rights are no longer seen as the anathema to the copyright system, critical examination of the right of integrity in this paper reveals that such conclusions are unfounded. The introduction of moral rights has not only deluded those commentators but also the creators

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50. This avoids simple analogies of the obvious elements such as acquisition and duration, both of which are the same for moral and economic rights.

51. Marina Santilli, 'Moral Rights Developments in European Perspective' (1997) (1)1 Marq. Intell. Property Law Review 90.

52. Lior Zemer, 'Rethinking Copyright Alternatives' (2006) 14(1) IJL & IT 140.

53. Vincent Porter, 'The Copyright Designs and Patents Act 1988: The Triumph of Expediency Over Principle' (1989) 16(3) Journal of Law and Society; Rigamonti (n 3) 353.

of works. Comments in the parliamentary debates themselves indicate that while the introduction of moral rights is not objected to in principle, it would not be allowed to interfere with commercial practices.[54] The preservation of this is reflected in the shortcomings of the right of integrity that is riddled with exceptions, which would otherwise be troublesome to the exploiters of works. The combination of statutory provisions and courts' interpretation of them has been demonstrated to further limit the scope of section 80. Though it is not always clear as to whether the authors would be successful at common law for moral-type grievances, the courts appear to be less reluctant to imply terms and generally rule over common law principles, as opposed to statutory provisions that are still perceived as 'newcomers'[55] to the UK.

However, despite the current failures, some enthusiasm for the future development of moral rights exists. Comfort may be sought in that ultimately 'moral rights did not emerge in their full glory in a single triumphant burst. They were the product of an evolution.'[56] While this may explain some of the shortcomings of moral rights protection in intellectual property, incremental developments will mean little in a system where the copyright law and the courts are reluctant to depart from commercial considerations. With this in mind, it has been suggested that a reconceptualisation of moral rights is needed. On the basis that moral rights are consistent with the common law position on economic and property rights, by having the ability to protect pecuniary interests, moral rights will be freed from the dichotomy between it and economic rights. As such, they can, for the first time, act as a complementary force to economic and commercial considerations. Until such

54. see HC Deb 25 July 1988 vol138cc 177-84 (182), Mr Fisher, Member for Stoke on Trent.

55. Vaver (n 5) 271.

56. Cornish (n 4) 452.

a position is acknowledged academically and achieved in practice, authors will remain vulnerable to exploitation and moral rights will retain their exclusionary, inapplicable and largely symbolic existence.